Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

Gregorio Igartua, et. al.

Petitioners

United States

Respondent

Petition for a Writ of Certiorari to the
U.S. Court of Appeals "en banc"
For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE FEDERAL DISTRICT COURT AND THE APPEALS COURT "EN BANC" (1ST CIR) ERRED IN DETERMINING THAT PUERTO RICO CANNOT HAVE ELECTORS WITHOUT A CONSTITUTIONAL AMENDMENT, NOTWITHSTANDING JUDICIAL AND CONGRESSIONAL APPLICABILITY OF CONSTITUTIONAL PROVISIONS TO PUERTO RICO WITHOUT PREVIOUS REQUIREMENT OF AMENDMENT?

B. WHETHER THE FEDERAL DISTRICT COURT, AND THE APPEALS COURT "EN BANC", ERRED IN DETERMINING THAT PETITIONERS REQUEST OF THEIR RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS PRESENTS A POLITICAL QUESTION, OR REQUIRES PUERTO RICO TO BECOME A STATE, DISREGARDING CONSTITUTIONAL APPLICABILITY TO PUERTO RICO WITHOUT POLITICAL OR STATEHOOD REQUIREMENT ?

C. WHETHER THE APPEALS COURT "EN BANC" ERRED IN DETERMINING, IN DEFIANCE TO US CONSTITUTION ART. VI, THAT TREATIES TO WHICH THE UNITED STATES IS SIGNATORY ARE NOT OBLIGATORY, BUT MERE ASPIRATIONAL INSTRUMENTS NOT SUPPORTING PETITIONERS' CLAIM?

D. WHETHER THE COURT OF APPEALS "EN BANC" ERRED IN DENYING PETITIONERS REQUEST FOR DECLARATORY JUDGMENT AND FOR RELIEF, NOTWITHSTANDING DOMESTIC LAW AND TREATY PROVISIONS PROVIDING JUDICIAL REMEDIES FOR PETITIONERS VOTING RIGHTS REQUEST?

THE PARTIES

GREGORIO IGARTUA; CARLOS MENDEZ-MARTINEZ; JORGE IVAN RODRIGUEZ-FELICIANO; RAFAEL ZERUTO SOTO; RAÚL RIVERA-GASCOT; MARICARMEN RIVERA-GASCOT; LUIS R. SOLTERO-HARRINGTON; FRED SOLTERO-HARRINGTON; WANDA RAMOS-MARQUEZ; JORGE LUIS PEREZ-DIAZ; PEDRO MENDEZ-SOTO; VICTOR RODRIGUEZ-VILLANUEVA*

Petitioners

US GOVERNMENT

Respondent

* All Petitioners are 4th, 5th, and 6th generation American citizens residents of Puerto Rico (4 million citizens)

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STATEMENT OF JURISDICTION

Action arises in accordance with the provisions of: 28 USCA 1651 (a); 28 USCA 1343 (a)4, and 2201, 42 USCA 1973 ff8, 48 USCA 731-916: under the U.S. Constitution, Articles I, II, III, IV, and VI, Amendments I, XII, XIII, XIV, XV, XIX, XX, XXII, XXIII, XXIV and XXVI; under Treaty Covenant of Political and Civil Rights, (999 UNTS 171) (App. – pgs. 69-93, hereinafter cited as ICCPR); under UN Human Rights Declaration (G.A. Res. 217 A III A/810, 1948, pg. 94), hereinafter cited as UN Declaration HR. (App. – pgs. 94-102) and, under the Democratic Charter of the Organization of American States (OAS Doc OEZ/SerP/AG/Res/2001) (App. – pgs. 103-110, hereinafter cited as OAS Charter), and U.S. Supreme Court Rule 10.

NATURE OF THE CASE

This is an action for declaratory and injunctive relief to redress the deprivation of rights and privileges secured Petitioners, and all other American citizens of Puerto Rico, to vote in Presidential Elections, under the Constitution of the United States of America, U.S. treaty law, U.S. legislated provisions, and under U.S. judicial interpretation. (4 million American citizens of Puerto Rico.) (4 million American citizens formerly born and residing in Puerto Rico moved residence to the 50 States.)

CONSTITUTIONAL STATUTORY AND TREATY PROVISIONS

- US – Constitution Art. I, II, III, IV, and VI – Amendments I, XII, XIII, XIV, XV, XIX, XX, XXII, XXIII, XIV and XXVI;
- 28 USCA 1651 (a), 1343 (a)4, 2101 2201, and 1291; 48 USCA 731-916;
- ICCPR;
- OAS – Democratic Charter; and,
- UN – Declaration of HR.

PROCEEDINGS BELOW

Petitioners submitted their complaint in the Federal District Court of Puerto Rico in October 2003. Jurisdiction in this Court of first instance was supported by: 28 USCA 1331 which provides for all civil actions arising under the Constitution, laws, or treaties of the United States; U.S. Constitution Art. I – Section 8; Art. IV – Section 2, Section 3; Amendment XIV; Section 1 & 5; and Amendment XV. Defendant filed Motion to Dismiss. Petitioners opposed. The District Court dismissed the case on basis of *stare decisis*. (Brief - Annex D, pg. 102a.) Petitioners appealed to Appeals Court (1st. Cir.). Two Judges of the Panel confirmed the Judgment of the District Court, but stated case was more proper for judicial disposition by the Court "en banc", or by this U.S. Supreme Court. (Judge Torruellas dissented.) (Brief - Annex C.) Petitioners requested reconsideration. The same Panel vacated its own judgment and granted Reconsideration. (Brief – Annex B.) The Appeals Court "en banc" in a very unusual judicial practice decided to review the Motion for Reconsideration taking the case from the Panel. (404 F3d.1) (Brief - Annex B.) The Appeals Court "en banc" confirmed the District Court 5-2, August 3, 2005. (Judges Torruellas, and Howard dissented.) (407 F3d. 30) (Brief - Annex A) From this Judgment Petitioners respectfully request Petition of Certiorari to this Honorable Supreme Court.

STATEMENT OF FACTS AND REASONS FOR GRANTING THE WRIT

Puerto Rico is the only U.S. Territory (of 4) that meets the minimum population required to elect electors. (8 electors) Its citizens are 4th, 5th, and 6th generation American citizens. (See González v. William, 24 Sup. Ct. Rep. 177; 39 Stat. 953 & 64 Stat. 319.) (Annex A, pg. 45 to 54) The Puerto Rico Constitution was adopted in 1952 by direct vote of the citizens, and ratified by Congressin 1952. (In accordance with U.S. Const. Art. IV – Sec. 4.) (1 L.P.R.A. 247)

Petitioners as U.S. citizens of Puerto Rico, have an interest in voting for the President and Vice President of the United States, to

the same extent as that of other U.S. citizens in the Nation, since they have the same "at stake" by the exercise of such a voting right. The Executive power of the Federal Government is vested in the President of the United States. (U.S. Const. Art. II – Sections 2 and 3.)

Petitioners, as American Citizens of Puerto Rico, claim that they have the right to vote in Presidential Elections following an interpretation of the words of the Constitution based on legislated provisions, treaty law, and judicial interpretations, and/or other evidence of how these are presently practiced and applied by the U.S. Government, not only for American citizens, but to defend democratic rights of citizens of other countries. This Petition for Certiorari is necessary because it is only through the judicial channel that the applicable law regarding their fundamental right to vote in Presidential elections as American citizens can be clarified and granted. (US Const. Art. III and VI) Petitioners expose that this case involves questions of exceptional legal importance, and that there is sufficient controlling legal authority that offers this Court sound reason to reverse the judgment of the District Court, and of the Appeals Court. Since the right to vote is the most fundamental right for American citizens, including for Petitioners and for all the American citizens of Puerto Rico, this issue deserves to be clarified by the Federal Courts of the United States through the available remedies in this action, in this case by a Petition of Certiorari to the U.S. Supreme Court.

The Appeals' Court "en banc" (two judges dissenting), made a narrow interpretation of the right to vote of Petitioners in Presidential Elections, in such a way that it confines them to a state of servitude with respect to the Federal Government, and in a way inconsistent and contrary to its own interpretations, and of those of this Court. The denial of the right to vote in Presidential Elections is a condition of servitude upon all the American citizens of Puerto Rico (Servants), because all are compelled to accept the applicability of government without their consent from the Federal Government (Master). (Brief – Annex A, pg. 65a) (Compare to the Slaughter House Cases – 83 US 36.) This Honorable Court must reverse the Judgment of the Federal District Court, and of the Appeals Court to free the American citizens of Puerto Rico from the dead end situation that the dismissal of their Complaint

provokes. (Brief – Annex A, pg. 23a.) (The condition of servitude has endured for 107 years, since 1898 when the United States on its own political initiative decided to acquire Puerto Rico as a result of the Spanish-American War by the Treaty of Paris (30 States 1754), and was heightened by the discriminatory opinions in the Insular Cases; e.g. Downes v. Bidwell, 182 US 244, 1901.)

Four years ago in Igartua v. U.S., (229 F3d 80, hereinafter cited as Igartua II). Honorable Judge Torruellas espoused that "the United States citizens residing in Puerto Rico are caught in an untenable Catch 22...." because of their national disenfranchisement.... All Federal Courts that have disposed of a case involving Petitioners right to vote in Presidential elections have stated in one way or another.... "that there is little doubt that all American citizens living in Puerto Rico are suffering a grave injustice. As American citizens they should be allowed to vote..." (J. Howard dissenting, Brief – Annex A, pg. 89: "The inability of American citizens residing in territories to participate in the election of our nation's leaders is as antithetical to our foundational democratic values....") The inaction of Congress and of the Executive Branch in the area of federal voting rights for the American citizens of Puerto Rico, and the restrictive interpretation of the Federal Courts are confining the American citizens of Puerto Rico to government without consent, to a state of servitude by disenfranchisement. Moreover, consider that the American citizens of Puerto Rico, while in active military duty have to defend the democratic rights of citizens of other countries. It cannot be ignored how many American citizens of Puerto Rico have died in military action to defend democracy, under the embarrassing situation of being denied their right to vote for their Commander in Chief.

The right to vote in Presidential elections has evolved since the adoption of the U.S. Constitution by constitutional amendments, by legislation (particularly the Voting Rights Act of 1965, 42 U.S.C.A. 1971 et. seq., and the 2002 Help America Vote Act), by jurisprudence, and by treaty law, to such an extent that it protects all American citizens rights to vote, except those residing in Puerto Rico. This denial constitutes residential status discrimination. The situation is so discriminatory that an American citizen can move residence to any state, and vote in a Presidential

Election. If that same citizen moves residence to any country in the world he can still continue to vote absentee, except that, if he moves residence to Puerto Rico, he losses the right to vote in Presidential elections. (42 U.S.C.A. 1973 ff(8))

It is pertinent for this Honorable Court to consider that the District Court granted the American citizens of Puerto Rico their request to vote in Presidential Elections in Igartua II, in 2000. The Legislature of Puerto Rico adopted the Law for the Presidential Elections, including the procedure to vote for eight electors. Two million ballots were printed. (Brief Annex E) Votes were mailed to absentee voters. The opinion was revoked by the Court of Appeals a few days before election date. Some citizens were able to vote absentee, as did petitioner Wanda Ramos, a member of the Puerto Rico National Guard. The absentee ballots, including hers, were received before the judgment was revoked, but were not counted. Nearly two million ballots had to be destroyed in Puerto Rico, in the United States, under the American Flag, one week before the 2000 elections.

The Appeals Court is adhering to the procedural element of the Presidential election, the electors requirement, ignoring the substantive element - the right to vote which flows to the People through American citizenship. Both are compatible and mutually inclusive. Treaty obligations of the United States for the American citizens of Puerto Rico were also ignored by the Federal District Court, and now by the Appeals Court which label these as mere "aspirational instruments". (Brief – Annex A., pg. 8) Thus, whether the United States honors its word and its international obligations is at issue in this Petition. The applicability of the treaties invoked by Petitioners in support of their claim to vote in Presidential Elections, and the denial by the Appeals Court "en banc" in defiance to the disposition of Article VI of the U.S. Constitution involves an important federal question that should be solved by this Court.

Exceptional circumstances warrant the exercise of this Court's discretional powers to grant this Petition of Certiorari. There are contradictory, and/or conflicting opinions by the Federal District Court in Puerto Rico, by the First Circuit Court of Appeals, and by this Honorable Supreme Court, which are affecting Petitioners

request for relief in their claim for voting rights, and which can only be clarified, harmonized, and resolved by this Court. For some purposes, the U.S. Constitution is applied by the Federal Courts without considering any need for constitutional amendment, Congressional Legislation or, without the political requirement that Puerto Rico become a state, and different treatment is given in other cases (including those dealing with fundamental rights). Moreover, compare the opinion of the District Court granting the right to vote in Presidential elections to Petitioners in Igartua II, with the present judgment of the Appeals Court "en banc", with five judges denying Petitioners voting rights claim against that of two judges dissenting.

The impact of the injury to the American citizens' of Puerto Rico because of the denial of their right to vote in Presidential elections is great in terms of social, cultural, and economic values. It constitutes a per se violation of voting rights (Argument C-3 OAS Charter). Petitioners are in a condition that can be characterized as a "disenfranchisement curse". Adequate domestic judicial relief cannot be obtained in any other form or from any other Court.

ARGUMENT

A. The Federal District Court, and the Appeals Court "en banc" (1st Cir), Erred in Determining that Puerto Rico Cannot Have Electors Without a Constitutional Amendment, Notwithstanding Judicial and Congressional Applicability of Constitutional Provisions to Puerto Rico Without Previous Requirement of Amendment

Petitioners propose to this Honorable Court that the legal requirement of a constitutional amendment, upon which the Court of Appeals "en banc", as the Federal District Court, relied to dismiss the case, failed to address and resolve the real legal issues brought now before this Court. Present interpretation of the "right to vote" from jurisprudence, congressional legislation, and treaties, justify that this Court examine the arguments before it.

The arguments in Petitioners claim support the relief requested on the basis that the source of the right is citizenship, and that there is sufficient legal basis to justify that a constitutional amendment is

not necessary under present legal voting rights interpretation, and under federal judicial and congressional practice for Puerto Rico since 1898 of applying constitutional provisions without requiring constitutional amendments. The Appeals Court, as the District Court", are making an interpretation of Art. II and of Amendment XII providing for the elections of electors like as if these were a "brick wall" to citizens voting rights. This is to ignore the judicial interpretation of the right to vote as a fundamental right which flows to the people through citizenship. Within the context of how Executive Branch policies supports Petitioners claim, consider President Bush's recent remarks about democracy and the Irak's Constitution to military families in Nampa, Idaho "....[t]he document that our founders produced in Philadelphia was not the final word. ....[l]ike our founding fathers they will come up with a system that... guarantees the voting rights of all their citizens. (Office of the President, White House, 8/24/05.) The right to vote in Federal elections must be considered within its Constitutional perspective which includes other constitutional dispositions applicable also to this voting rights claim, such as the 1st, 14th, and 15th Amendment.

The Appeals Court held that "Government is based on political compromise rather than conceptual perfection", and that electors are for states because the Constitution provides it" (Brief – Annex A, pg. 4a) The Court for purposes of this case is confining the interpretation of the Constitution to a political compromise that led to its adoption in 1789. In doing so, the Court is ignoring how that political compromise has evolved, in the case of Puerto Rico to the extent of constitutional application without amendments. It is the duty of the Courts to say what the law is, and to interpret the Constitution. (Marbury v. Madison, 2 L. ed 60.) It is the duty of the Courts to correct such imperfections when brought before them. (See J. Howard, Annex A, pg. 90 – ".... We ought to approach their claim searchingly rather than skeptically....")

Petitioners are not proposing, nor pretending, the elimination of the requirement of the election of "electors", of the Electoral College. Petitioners propose that the "Electoral College" can be implemented in Puerto Rico as the District Court already did in Igartua II. Puerto Rico has a legislature, and the population to determine its number of electors is also determined by the U.S.

Census, (8 electors) as in the states. The Electoral College is not regulated by "states", but ultimately by Congress (3 U.S.C.A. 1-21.)

The Electors System is not the substantive source of the right to vote in Presidential Elections. Petitioners propose it is part of the procedure of the Presidential election. It is American citizens who vote for the President. The Elector is like an intermediary who is morally committed to follow voters choice of their presidential candidate. The same elective process set forth in the Constitution, as related to the voting for electors, was and can be adopted in Puerto Rico, as it is implemented in a "State", (or like in the Territory of D.C, to the extent of sending the votes of the electors to the U.S. Senate).

The source of the right to vote in Presidential Elections has been defined as deriving from American citizenship, and not deriving from state rights, particularly since the adoption of the Voting Rights Act in 1965. (42 USCA 1971, et seq.)

> "....This revolution also constituted a nationalization of the right to vote. The Voting Rights Acts, coupled with a succession of Supreme Court decisions, effectively brought to a close the era of state control over suffrage...."
> "....the Court's discovery of the applicability of the equal protection clause to voting rights represented the Court's own embrace of the internal logic of suffrage reform...."
> (A.Keyssar, the Right to Vote-The Contested History of Democracy in the United States, at 282-83 (2000).)

It is pertinent to consider that the Voting Rights Act of 1965, refers to voting rights of citizens, not of electors, and provides for judicial remedies for violations of the law. The absentee vote provisions of the Act recognized a new class of voters, absentee voters with residence in other countries, and refers to citizens, not to electors. (42 U.S.C.A. 1973 ff6 - 1 to 8.) In 2002 Congress adopted the "HELP AMERICA VOTE ACT OF 2002 (PUBLIC LAW 107-252–OCT. 29, 2002)", providing for four billion dollars in aid to the states and to Puerto Rico to guarantee more fair and efficient elections for voters, for American citizens to participate in federal elections, not for electors.

In September, 2005, President Bush received the "Report of

the Commission on Federal Election Reform". (J. Carter & J.A. Baker, Building Confidence in U.S. Elections, 9/2005.) It concentrates on citizenship voting rights – "....As a nation, we need to pursue the vision of a society where most Americans see their votes as both a right and a privilege, where they cast their votes in a way that leaves them proud, of themselves as citizens and of democracy in the United States. (Id at 69.) ....The vigor of American democracy rests on the vote of each citizen.... Democracy is endangered when people believe that their votes do not matter...." (Id. at 1.) Presently there are 6.1 million absentee eligible voters. (Id. at 37.) Evidence shows that the right to vote in the United States has evolved gradually year by year in favor of "citizenship" as the source of the right, without the need for eliminating the "Electoral College". It is inconceivable today that voting for electors by citizens would be substituted with an election of electors by a state legislative. If it does happen, Puerto Rico has a legislature, like states, not D.C.

Why do the Federal Courts require in some cases related to Puerto Rico a Constitutional Amendment or that it become a state, and not for others? Judicial contradiction? Judicial discrimination? Judicial ignorance about Puerto Rico? Why require it for this case? Petitioners propose that in Puerto Rico the Constitution has been applied without the need for constitutional amendments, so that, considering the expansive interpretation of the right to vote, none is necessary for the granting of the presidential vote to the American citizens of Puerto Rico. Constitutional provisions have been applied to Puerto Rico since 1898 without constitutional amendments. Congress (Law 600 Sec. 2, 1 LPRA US Const Art. IV - 1) and the Federal Courts have applied most constitutional provisions to Puerto Rico, that refer in the constitution only to states, or that the Constitution limits exclusively to states. Torres v. Puerto Rico, 442 U.S. 465, 469-470; Examining Board v. Flores de Otero, 426 U.S. 572, 599-601; Calero –Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663; Mora v. Mejias, 115 F.Supp. 610 (PR 1953); Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank, 649 F.2d 36, 39-42 (CA1 1981); Califano v. Torres, 435 U.S. 3 (1978); Posadas de P.R. Associate v. Tourism Co. of P.R., 478 US 328; Sea Land Services v. Municipality of San Juan, 505 F.Supp. 533 (1980); Trailer Marine Transport v.

Rivera Vázquez, 977 F.2d 1; Walgreen Co. v. Rullan, USCA1 – Opinion 03-2542; In re Corporación de Servicios Medicos de Fajardo v. Izquierdo Mora, 805 F.2d 440 (1986); Terry Teviol Torres v. Commonwealth of PR, 442 U.S. 465, (1979); Exxon Mobil Corp. v. Allapattah Services Inc., No. 04-70, US Supreme Court, 6/23/2005; Pan American Computer Corp. v. Data General Corp., 562 F.2d 693, 1983; and Rivera Carbana v. Cruz, 588 FS 80 (1984). See also, P.R. Federal District Court, October 2003, Civil No. 021643 (JP) Antilles Cement Corp v. Sila M. Calderon. By analogy, see also, Loughborough v. Blake, 18 U.S. 317.) Thus, Petitioners are not requesting the application of something unprecedented. "....The amending process is not the only way in which constitutional understanding alters with time...." (Oregon v. Mitchell, 400 US 112) Moreover, consider that the American citizens of Ohio participated in Presidential elections since 1803 as if Ohio were a state. It was not formally admitted as a state until 1953 when it was detected that it had been not formally admitted in 1803. J.B. Hartranft, "It's Ohio Bicentennial - Or is it?", Winter 2003, Columbus Bar Briefs.

Petitioners respectfully propose to this Court that constitutional Amendment XII (adopted in 1820) cannot be considered isolated but in conjunction with Art. VI related to treaty applicability by the Courts (Arguments C, and D) and with other Constitutional Amendments adopted later. The US Constitutional Amendments after Amendment XII, and related to voting rights, are all based on the protection of American citizens voting rights, not those of electors. (Amendments: XIV, XV, XIX, XXIII, XXIV, and XXVI.) Particularly, consider that Amendment XIV Section 2 relates the procedure of voting for electors according to citizen voting participation.

The right to vote in Presidential elections under the Constitution is a fundamental right. (Brief – Annex A, pgs. 55-56) On many occasions this Supreme Court has established that the Constitution secures the right to vote in federal elections, and even in primaries, a process in which P.R. participates. O'Brien v. Brown, 409 U.S. 1, 14-15 (1972); Reynolds v. Sims, 377 U.S. 533, 554 (1964); Gray v. Sanders, 372 U.S. 368, 380 (1963); United States v. Classic, 313 U.S. 299, 315 (1941). By judicially disposing of the Complaint based on the need for either

requirement of a constitutional Amendment, or that Puerto Rico become a state, the Court of Appeals "en banc" ignored the real legal issue supporting this Petition, that the inability of individual United States citizens residing in Puerto Rico to vote for the President and Vice President, in and of itself, results in an unconstitutional deprivation of a right of citizenship. (Tashjian v. Republican Party, 479 U.S. 208, 217 (1986); Burson v. Freeman, 504 U.S. 191, 198 (1992).)

This Supreme Court has also stated that the right to vote constitutes a national right guaranteed by the principles of freedom of association as articulated in the First Amendment to the Constitution and protected by the Due Process and Equal Protection Clauses. See Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Carter v. Dies, 321 F. Supp. 1358, 1361 (D. Tex. 1970) (Holding that the right to vote is clearly fundamental.) The Appeals Court "en banc" as well as the Federal District Court are ignoring this fact that citizenship is the source of the voting right. (See U.S. Term Limits v. Thornton, 514 US 779 at 793, (Justices Stevens & Kennedy). In Bush v. Gore case 121 S CT 525, (after Igartua II) this Court recognized citizenship as the source of the right to vote:

> "....voting is a fundamental right. Bush v. Gore...." (121 S.Ct. 525, 529 (2000).)
>
> "History has now favored the voter, and... the citizens themselves vote for Presidential electors...." (Bush v. Gore, 531 U.S. 98, at 104.

The procedure of voting for electors cannot be considered as an isolated source of the right to vote. It is citizens who vote for the President using electors as intermediaries, who are morally committed to follow their instructions.

Since the early years of the birth of our Nation this Supreme Court has recognized that the U.S. Government proceeds were established directly from the people, from its citizens, not by the states in their sovereign capacity. (See Marbury v. Madison, 2 L.ed 60, 73; Martin v. Hunter, 4 L.ed 97, 102, 104; McCulloch v. Maryland, 4 L.ed 579, 600, 601; Cohen v. Virginia, 5 L.ed 257, 293; Downes v. Bidwell, 182 US 244; Justice Harlan dissenting opinion, A. Lincoln, Gettysburg Address (1863).) The right to vote in federal elections of the American citizens has been

liberally expanded by judicial interpretation. The legal basis of the voting right is citizenship. (Wesberry v. Sanders, 376 US 1, 17 - 18). (See also: Reynolds v. Sims , 377 US 569 (1964); Illinois State Board of Election v. Socialist Workers Party, 440 US 173; Yick Wo v. Hopkins, 118 US 356 (188); League of Women Voters v. Diamond , 965 F597); Harman v. Forssenius, 380 U.S. 528,536; Williams v. Rhodes, 393 U.S. 23, 29; Kramer v. Union Free School District No. 15, 395 U.S. 621, 626; Dunn v Blumstein, 405 U.S. 330, 334; McIntyre v. Ohio Elections Commission, 514 U.S. 334, 379. (Moreso, see Galagher v. Indiana State Election Bd, 598 NE 2d 510 (Ind 1992).

Petitioners contend that the District Court's decision and the Circuit Court's Opinion "en banc" should be reversed, and that this Court should hold that the American citizens of Puerto Rico have the right to participate in Presidential elections, that the Electoral College can be implemented in Puerto Rico, as flatly consistent with present U.S. Constitutional judicial interpretation, without the need for a constitutional amendment, or the requirement that Puerto Rico become a state.

B. The Federal District Court, and the Appeals Court "en banc", Erred in Determining that Petitioners Request of Their Right to Vote in Presidential Elections Presents a Political Question, or Requires Puerto Rico to Become a State, Disregarding Constitutional Applicability to Puerto Rico Without Political or Statehood Requirement

The Federal District Court, and the Appeals Court "en banc" erroneously confined Petitioners claim to a political requirement - that Puerto Rico become a state. (Brief - Annex A, pgs. 4a-6a) By dismissing the complaint, the Appeals Court disposed of this case as one of a "no justiciable political question" case suitable only to be transferred to the expectations of Congressional action. (Brief - Annex A, pg. 13.) The Appeals Court did not consider that Congress has its hands tied in relation to this voting rights claim, because it requires judicial interpretation, and it is the Courts which are the sole judges of constitutional interpretations. (U.S. Const. Art. III.)

The Court erred in stating that a "statehood path for

constitutional applicability is not the courts" (Brief – Annex A, pg. 6) The Court confused this claim for voting rights with a claim for statehood, ignoring American citizens vote in the territory of D.C. and overseas. The Court of Appeals "en banc" did not consider the main issue in the Complaint, that the inability of individual United States citizens residing in Puerto Rico to vote for the President and Vice President, in and of itself, results in an unconstitutional deprivation of a right of American citizenship. This situation is critically harmful not only to the United States citizens affected, but to our democratic system as a whole, which is weakened to the extent a considerable fraction of its citizens are unjustifiably deprived of their fundamental right to vote.

The Court erred in holding the Complaint deals with a political question issue. Petitioners are all American citizens by birth and their voting rights claim cannot be subjected to the expectation of political plebiscites which may say what these may be, not what these are since 1898, American citizens. (Brief - Annex A, pg. 9) Petitioners have the constitutional right that their voting rights claim be considered and be judicially disposed by the Federal Courts as any other American citizen claim on voting rights. Similarly, the Court ignored that all the laws adopted by Congress (including Voting Rights laws) are adopted under the veil of constitutional authority and are made applicable to Puerto Rico, like to states, without constitutional amendment, or without the political requirement that Puerto Rico become a state.

The goals of democracy have been substantially furthered by the judiciary, "especially under the equal protection clause in the apportionment cases and others which removed shackles on the exercise of the franchise." 13A C. A. Wright, A. R. Miller, & E. H. Cooper, Federal Practice and Procedure § 3534.1, n.5 (2d. 1984, (citing Choper, Judicial Review and the National Political Process 71-72, 127 (1980)). Petitioners are seeking such declaratory and injunctive relief from this Court as may be proper to assure them, and all others similarly situated, due process and the equal protection of the laws which now and for more than a century have been denied to them by Defendant in Presidential elections. (107 years.) This Supreme Court has held that the voting rights of the American citizens of Puerto Rico are constitutionally protected to the same extent as those of all other US citizens. (Rodriguez v.

Popular Party, 457 US 1.) There is no political question invoked in this Complaint, this is a voting rights case. The relation of Puerto Rico to the United States will not be altered by the granting by this Court of the judicial relief sought, as it was not altered for D.C., nor by the extension of other constitutional provisions to Puerto Rico over the years.

By considering this claim within the context of a political question issue, the Appeals Court went further than this Court in Pleasy v. Ferguson, 163 U.S. 537, because it treated the American citizens of Puerto Rico as "separate and unequal", while reviewing the applicability of the Insular cases to Puerto Rico. (Downes v. Bidwell, 182 US 244.) (Annex A, pg. 4) This is a voting rights case, and the Appeals Court should not have consider such discriminatory cases which are no longer applicable to Puerto Rico. The Federal Courts should consider what Congress has done for Puerto Rico since 1901 ignoring these cases, including granting American citizenship at birth. It is only this Hon. Court that can end this discriminatory treatment once and for all. (Brief - Annex A, pgs. 40-45) Moreover, Politics is not related to the voting rights of an American citizen residing in Puerto Rico. Voting rights of absentee voters were protected and the procedure was not qualified as political.

Petitioners are aware that statehood cannot be redressed through judicial channels and are not asking for it. To the contrary, the premise of this claim is that under the current legal conditions it is a valid claim since it is based on citizenship. Why the Appeals Court "en banc" insisted in channelizing the judicial disposition of this voting right case as one involving a "political question", when for other cases related to constitutional dispositions in the jurisdiction of Puerto Rico, the Federal Courts have not considered the political question issue? (See Argument A.) Voting rights cases, are considered by the Courts as civil rights controversies, and are judicially disposed of daily without the political issue consideration.

This Supreme Court has consistently decided matters concerning the individual liberties of the United States citizens as set forth in the Bill of Rights in matters of race, segregation, and religion. These decisions have certainly expanded the application of the concept of the freedom of the individual for the betterment

of the Nation. This Supreme Court has considered as justiciable those cases where legislative reapportionment and gerrymandering have been called into question. See, e.g., Davis v. Bandemer, 478 U.S. 109 (1986); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944). In considering the reapportionment cases, this Supreme Court relied on the principle of one person, one vote as the cornerstone of American democracy and as a principle which prohibited the dilution of the minority vote. The Supreme Court also challenged the constitutionality of the concept of separate but equal in Brown v. Board of Education, 347 U.S. 483 (1954). In view of these precedents, this Court cannot accept the Appeals Court proposal that the instant case may be considered as posing a political question in which the Court should not intervene. There is no distinction between the instant case and the cases of gerrymandering, voting rights, and segregation insofar as justiciability is concerned. As in those cases, the instant case calls for the recognition of the existence of a fundamental right, the right to vote and its implementation by opening the ballot box in Puerto Rico to four million American citizens. The judgment of the District Court and of the Appeals Court should be reversed and requested declaratory Judgment should be granted.

C. *The Appeals Court "en banc" Erred in Determining, in Defiance to US Constitution Art. VI, That Treaties to Which the United States is Signatory Are Not Obligatory, But Mere Aspirational Instruments Not Supporting Petitioners' Claim*

The voting rights of American citizens, in this case of Petitioners, are not only derived from domestic legislation adopted by Congress, but also from obligations assumed by the United States under treaty law, or under Resolutions adopted by the United States under Treaties to which it is also signatory. (Brief - Annex A, pg. 43a-59a) Under Article VI of the U.S. Constitution, treaty provisions are considered binding: (See US v. Steinberg, 478 FS 29, 1979). Notice that Article VI refers to treaties as "Supreme Law of the Land", not of the states. American citizens of Puerto Rico are not excluded from their applicability. Notwithstanding, Defendant refuses to recognize their applicability

as claimed by Petitioners by referring to these as merely "aspirational instruments" and the Court of Appeals erroneously agreed in defiance to the disposition of Art. VI. (Brief - Annex A, pgs. 4a, 68a-70a) For the Court, these are not "the law of the Land". (See also US Const, Art. III)

Petitioners claim for declaratory judgment and relief is supported under Art VI of the U.S. Constitution by the following international treaties, and/or resolutions to which the United States is signatory:

1) ICCPR (Article 2 & 25)
2) U.N. Declaration HR (Article 21)
3) OAS – Democratic Charter (Article 3)
4) OAS American Declaration (Article XX)

1. The ICCPR, as Applicable to the Complaint

Consider the pertinent sections of the Treaty as applicable to this Complaint, and which state in pertinent part as follows:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or "other status".

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(b)To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;.... (Article 26 provides – "All are entitled to equal protection of the law.")

"Other status" in Article 2 has been interpreted by the UN Human Rights Committee to include residence. (Sweden, Comm. No. 298/1998, Hum. Rts. Comm., 40th Sess., U.N. Doc. CCPR/C/40/D/2981198 (1990).) To this end, the ICCPR prohibits differentiating between citizens based on residence. According to the international legal obligations the U.S. has voluntarily

undertaken under the ICCPR and other human rights instruments, distinguishing, for purposes of the right to vote in Presidential elections between U.S. citizens living in Puerto Rico and those living in the States of the Union for the purpose of their right to vote, is neither reasonable nor objective. It constitutes a violation of Articles 2(1), prohibiting discrimination. Moreover, the exclusion of a citizen from the rights enjoyed by other citizens in the States, because he or she is a resident of Puerto Rico, has no justifiable basis, as interpreted by the Human Rights Committee, and constitutes a violation of Articles 25 of the Covenant, specifically the dispositions contained under paragraphs (a) and (b) providing for political participation and the right to vote.

This Supreme Court should consider that the Treaty was signed by the United States and that it is binding, (Article 11 of Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, hereinafter cited as the Vienna Convention), and it must be honored in good faith. Moreover, in Article 25 the Covenant requires signatories to respect and ensure voting rights generally similar to those protected domestically by the United States Constitution. (See: e.g., the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663, (1966); Wesberry v. Sanders, 376 U.S. 1, (1964); Reynolds v. Sims, 377 U.S. 533, (1964). The voting rights recognized by the Covenant are given effect in the United States by federal or State law, notably the Civil Voting Rights Laws, 42 U.S.C.A. 1971 et. seq., and the 2002 Help America Vote Act.) Moreover, the ICCPR has already been used by many courts to interpret existing U.S. law or to determine legal rights when the plaintiff has an independent cause of action. See: e.g., David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 Yale J. Int's L. 129 (1999); Kristin D.A. Carpenter, The International Covenant on Civil and Political Rights: A Toothless Tiger?, 26 N.C.J. Int'l Law & Com. Reg. 1, 48 (2000). See also: Alvarez-Machain v. United States, 266 F.3d 1045 (9th Cir. 2001, reversed in 504 U.S. 655); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996). In all of these cases, the courts relied on the ICCPR as a part of domestic law to determine the duties of individuals with respect to the enforcement of rights. (See 28 U.S.C.A 1350.)

In the absence of explicit congressional action directing violation of the ICCPR, its norms are part of U.S. law and are fully applicable to issues that arise with respect to the civil rights of the American citizens of Puerto Rico, in this case applicable to this voting rights claim. (But see: Brief - Annex A, pgs. 6a-9a) Respondent is in violation of its legal obligations under Article 25 of the Treaty by its discriminatory denial to Petitioners voting rights in Presidential elections. (See, Hon. Judge J. Torruellas, Brief – Annex A, Dissenting Opinion.)

Legally pertinent also are the decisions and general observations of the Committee established under the ICCPR Treaty, which state in pertinent part.

Article 25 – Human Rights Committee, General Comment 25 (57), U.N. Doc. CCPR/C/21/Rev.1/- Add.7 (1996).

- "Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service, Whatever form of constitution or government is in force,...."

Article 2 - Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

- "Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction...."

The above referred comments by the U.N. Human Rights Committee evidence that the ICCPR requires each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights" recognized in the ICCPR. The obligation to comply is immediate. (See: T. Buergenthal, and S.D. Murphy, Public International Law 137, hereinafter cited as P.I.L. Buergenthal.)

The United States has gone so far in its commitment to its binding obligation under the Covenant that it reaffirmed its

applicability in 1998 by Executive Order 13107. Thus, the Covenant imposes to Defendant an immediate obligation "to respect and to ensure" the rights it proclaims and to take whatever other measures are necessary to bring about that result. (See: T. Buergenthal, Int'l Human Rights, 351, hereinafter cited as HR Buergenthal.) The United States unilaterally has committed itself to be bound to the Human Rights Treaties, not only by signing the treaties, but also by signing internal documents as those previously cited to that effect. Consider that Congress did not adopt any reservation related to Art. 25 of the ICCPR. Furthermore, its disposition is not in conflict with Congress, or with States because these claim is related to a right that all American citizens enjoy, voting in Presidential Elections, except those residing is in Puerto Rico. Within this context, a claim by defendant that the Treaty is "not self executing" is not pertinent in this case. (Brief - Annex A, pgs. 6a-9a and pgs. 76a-81a) If the Judgment of the District Court, and of the Appeals Court "en banc", are not revoked, this Court will allow such legal disparity to prevail. Under treaty law, and under the provisions of the constitution (Art. VI), this Court and its Judges are bound by its terms and Petitioners, should be granted the requested relief. Amendment XII cannot be considered isolated and separate from Article VI, or from other Constitutional dispositions that are related to voting rights.

Under international law practice, a treaty is generally binding on states parties from the time it comes into force for them, whether or not it is self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations. (Ch. 2, Restatement of the Law, Third, Amer. Inst., Foreign Relations Law of the U.S., pg. 55; and sections 111, and 701) The signature by the United States in a Treaty involves the honor of the Nation in a written document. (Pacta Sun Servanda – Vienna Convention, Art. 26.)

The treaty establishes in Article 5 that the signatory country cannot restrict the fundamental human rights as set forth in it on the pretext of recognizing them to a lesser extent for domestic reasons. Consider this Honorable Court established that the voting rights of the American citizens of Puerto Rico are constitutionally protected to the same extent as those of all other U.S. citizens. (Rodriguez v. PPD , 457 US 1 (1982).)

This Court should grant this Petition to clarify the contradictory and/or erroneous opinions of the Courts below, the unfounded judicial assertion that the ICCPR is "merely aspirational", and to clarify Petitioners rights under the treaty.

2. The UN Declaration HR, as Applicable to the Complaint

One of the cornerstones of international human rights Resolution and which is applicable to this complaint is the UN Declaration of Human Rights, which states in Article 21 as follows:

> Article 21
>
> 1. Everyone has the right to take part in the government of his country, directly of through freely chosen representatives.
>
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (See also, Articles 2,7, and 30.)

The rights of Petitioners under Article 21 of the UN Declaration are being violated by the United States by the denial of their right to vote in Presidential elections. (See also as supporting Petitioners the Declaration on the Right and Responsibility of individuals... to Promote and Protect Universally Recognized Human Rights General Assembly resolution 53/144, March 8, 1999, Article 8; and Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE Article 7, June 29, 1990) Although adopted in the form of a non-binding resolution, over the years it has come to be accepted as an authoritative interpretation that the United Nations and its member states have an obligation to follow under Articles 55 and 56 of the U.N. Charter. (A Treaty to which the United States is signatory.) Moreover, it has been also accepted generally that it has acquired the status of customary international law. (See P.I.L. Buergenthal, supra at 133.) Thus, it binds the United States as a Resolution adopted under the authority of a Treaty, and as customary international law.

Human rights, as exposed in the UN Declaration, have evolved to such an extent that today human beings are deemed to have internationally guaranteed rights as individuals and not as nationals

of a particular state. A denial of voting rights to citizens in a country is considered internationally as a Human Rights violation. Moreover, democracy is considered to be a precondition for the effective protection of human rights (H.R.. Buergenthal, supra 23.)

The United States has recognized the importance of the UN Declaration and is committed to its applicability. Consider how the Executive is implementing the declaration by the adoption of Executive Proclamations:

- **Proclamation 7854 of December 10, 2004, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2004,** 69 F.R. 74947, (President G.W. Bush.)
- **Proclamation 7744 of December 10, 2003, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2003,** 68 F.R. 69939. (President G.W. Bush.)
- **Proclamation 7634 of December 9, 2002, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2002,** 67 F.R. 76669. (President G.W. Bush.)
- **Presidential Proclamation 7386 of December 9, 2000,** 65FR 78075. (President W.J. Clinton.)

Moreover, the U.S. Department of State has an Assistant Secretary of State for Democracy, Human Rights, and Labor who is responsible to the Secretary of State for matters pertaining to human rights and humanitarian affairs.... 22 U.S.C.A. 2651 a(c)(2). The office monitors democratic practices in all countries. (See Country Reports on Human Rights Practices for 2003, by Dept of State for Committee on Int'l Relations, US House of Representatives and Committee on Foreign Relations, US Senate, 109th Congress 2nd Session.) In Alvarez Machain v. U.S., 266 F3d 1045 (at 1051), the 9th Circuit found a violation of human rights by the U.S., supported in part by the UN Declaration of Human Rights. (See also Knight v. Florida, 528 U.S. 990 (1999). How can the Appeals Court conclude that the UN Declaration HR invoked is an action against Presidential and/or Congressional policies (Brief - Annex A, pg. 12) or embarrassing. (Id. at pg. 12)

The United States pretends to discriminatorily ignore its obligations under the U.N. Declaration for purposes of this claim, while attempting to use it only for purposes of fiscalizing other countries democratic policies, but not for internal applicability.

Within the disposition of US Const Art VI, this Court should grant this Petition to clarify that Art. XXI of the Declaration should be applied by this Honorable Court in support to judicially grant Petitioners claim of voting rights in Presidential Elections.

3. The Inter-American Democratic Charter Of The Organization Of American States, As Applicable To The Complaint

In 2001, the United States signed the Democratic Charter Agreement of the Organization of American States. The agreement was signed under the authority of the OAS Treaty (21 UST 607; TIAS 6847), to which the United States is also signatory. (See also as support to claim the American Declaration Art. XX, Brief - Annex A, pg. 46a) Article 1 of the Charter not only recognizes the right of the peoples of the Americas to democracy, but it also establishes an obligation for the signatory States to promote and defend it. For the purpose of the Democratic Charter Article 3 defines the essential elements of democracy as:

> "....1) respect for human rights and fundamental freedoms,... the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people,...."

It is clear that the United States as a member of the OAS and as signatory of the Democratic Charter has assumed an international legal obligation to promote and defend democracy abroad, as well as to recognize its citizen's right to democracy. Thus, by virtue of the Charter, the United States assumed a legal obligation towards the American citizens of Puerto Rico of recognizing, promoting and establishing a system that is based upon the principles established in Article 3.

The United States has actively promoted the applicability of the Charter in the OAS, for various cases related to democratic rights in the signatory countries, including to promote earlier elections in Venezuela. The importance and relevance of the Democratic Charter for the United States as signatory can be best described by the words of Secretary of State Collin Powell during an intervention at a General Assembly of the OAS in Chile, where he espoused:

> '....The Inter-American Democratic Charter declares that the peoples of the Americas have a right to democracy. It

does not say that the peoples of the Americas, except Cubans, have a right to democracy....."

Consider Secretary Powell did not exclude the people of Puerto Rico from rights to democracy.

The impact of the injury to the American citizens of Puerto Rico in social, cultural, and economic values, by the discriminatory denial of their voting rights in Presidential elections, cannot continue to be ignored by Federal Courts. Of particular importance are Articles 1, and 11 of the OAS Charter which establish that democracy and the social and economic development are interdependent and mutually enforceable. As a consequence, a signatory country like the United States (as all other Members of the OAS) has accepted and recognized that a lack of democracy constitutes a "per se" social and economic damage to citizens affected by it. Relief by this Court is urgently necessary to eliminate the social, political and economic damage caused by the denial of voting rights to all American citizens of Puerto Rico.

In light of the legal authorities just cited, the issues presented in this case may not be examined from a simplistic viewpoint as the Court of Appeals "en banc" did, by considering treaties invoked by Petitioners as merely "aspirational". The right to vote in Presidential Elections is a fundamental right of American citizens which is vital to our democratic system, and any restrictions upon its exercise just because these reside in Puerto Rico is a severe limitation on civil rights. Moreover, it is contrary to the international obligations of the United States under Treaty Law. Petitioners propose that, considering US Const. Art VI, there is sufficient legal basis under the treaties and/or Resolutions invoked by Petitioners as "Law of the Land", so that when considered also with domestic law, this Honorable Court can grant the declaratory judgment and relief requested to allow the American Citizens of Puerto Rico to vote in Presidential Elections.

D. The Court Of Appeals "En Banc" Erred in Denying Petitioners Request For Declaratory Judgment and for Relief, Notwithstanding Domestic Law and Treaty Provisions Providing Judicial Remedies for Petitioners Voting Rights Request

It is the Federal Courts who have the authority to interpret the Constitution, and Congress is bound by such interpretations. The denial of Declaratory Judgment and the Requested Relief by the Court of Appeals "en banc" in this claim is like stating in practical terms that any attempt by the American citizens of Puerto Rico to end their discriminatory denial of voting rights in Presidential Elections will be an exercise in futility. The Appeals Court "en banc" erred in determining that it is without jurisdiction to protect the voting right of its American citizens residing in Puerto Rico. (See Brief – Annex A, pg. 24a.) Declaratory Relief is provided under section 28 U.S.C.A. § 2201 (a) which states:

> "(a) In a case of actual controversy within its jurisdiction... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (See Aetna Casualty v. Quailes, 92 F3d 321, 4th. Cir.)

The District Court and the Appeals Court "en banc" erred by not determining that Petitioners Complaint, related to a discriminatory denial of voting rights, involves a case or controversy which is well settled by the Federal courts that is suitable for judicial declaratory relief. Propriety of remedy is consonant to precedents of judicial dispositions recognizing voting right as a fundamental human right. Judicial relief in this case would not be political, nor advisory. (But see, Brief - Annex A, pgs. 11a, and 21a) From a judicial perspective this Court should consider its long history of recognizing previously unrecognized constitutional rights, as those claimed by Petitioners. (See for example: Brown v. Board of Education, 347 U.S. 483, (1954); United States v. Carolene Prods. Co., 304 U.S. 144,152 n.4 (1938); Roe v. Wade, 410 U.S. 113, (1973); See Harper, 383 U.S. 347, (1915); Smith v. Allwright, 321 U.S. 649, (1944); Alden v. Maine,119 S.Ct. 2240);Adamson v. California, 332 U.S. 46, (1947); Malloy v. Hogan, 378 U.S. 1, 4-6, (1964); and Gideon v. Wainwright, 372 U.S. 335, (1963); Colegrove v. Green, 328 U.S. 549, (1946). It was not until this Court's 1962 decision in Baker v. Carr., 369 U.S. 186, overruling Colegrove, that the courts began to

address many long-suffered voting rights deprivations. In Cherokee Nation this Court said: "...It may be that the federal courts will be required to take extraordinary measures as necessary to protect discrete groups "completely under the sovereignty and dominion of the United States." Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (Marshall, C.J....."

The availability of declaratory judgment and of the requested relief is also supported under United States international obligations. (Brief Annex A, pgs. 59a-65a) The treaties invoked previously in this Brief (Argument C) require for the signatory countries to provide to their citizens a national remedy to redress their violation of human rights and as set forth below:

1) UN Declaration of Human Rights – Article 8
2) OAS Democratic Charter – Article 8
3) ICCPR – Article 2 (See also: Declaration on the Right of Individuals, Article 9.)

The Court decided Respondent can escape applicability of these treaties by finding that although these refer to citizens in general, these don't say which citizen can vote. (Brief - Annex A, pg. 6a) There is no distinction in American citizenship

As stated before, treaties are the supreme Law of the Land (US Const. Art VI). There is ample solid legal basis supporting their applicability to Petitioners claim. These are not only applicable because they were signed documents, and the "word" of the Nation should be one of complying, but because they are related to democratic rights, fundamental human rights of citizens, and as such have become applicable as customary law, which has been recognized by the Federal Courts in many cases. See for example Roper v. Simmons, No. 03-633, U.S. Supreme Court, March 1, 2005; Filatirga v. Pena-Irala, 630 f2d 876, 882-84 (2d Cir 1980); Siderman de Blake v. Republic of Argentina, 965 F2d 699, (9th Cir. 1992). In fact, Treaties apply as well to Territories: Geofroy v. Riggs, 133 US 258. Alvarez Machain v. U.S., 266 F3d 1045. (See Brief - Annex A, pg. 11a) In practical terms, the United States is a world power which has demanded democracy from all other countries, under the veil of treaties, and even with the use of force, to protect the voting rights of their citizens. The Constitution of the United States is a living document which accommodates itself to protect internationally such rights and domestically the rights and

freedom of its citizens. (Iraq, Afghanistan)

Within this context, the Restatement of the Law provides in pertinent part as follows:

> "This Court should consider that cases arising under treaties to which the United States is a party, as well as cases arising under customary international law, or under international agreements of the United States other than treaties, are "Cases ...arising under ...the Laws of the United States, and Treaties made... under their Authority," are therefore within the Judicial Power of the United States under Article III, Section 2 of the Constitution. Civil actions arising under international law, or under a treaty, or other international agreement of the United States are within the jurisdiction of the United States...."
>
> (See Sections **111**, **321** and **701** Restatement of International Law 3rd, 1990.) See: Article 26, *Pacta sunt servanda* (Vienna Convention) The Restatement of the Law also supports these international obligations, as exposed below; **§ 701. Obligation to Respect Human Rights; § 703. Remedies for Violation of Human Rights Obligations.** See also Vienna Convention on the Law of Treaties; Article 11, Article 27 - **Internal law and observance of treaties**, Article 29 and 46, - **Territorial scope of treaties,** Article 31 - **General rule of interpretation** – 1.

The legal authorities cited are evidence that there is no legal impediment for judicial disposition of this claim. Moreover, as Hon. Judge Torruellas stated in Igartua II, "....But in the final analysis, this problem is no more "political" than that presented to and resolved by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954), one that required corrective judicial action even in the face of longstanding legal precedent. In Brown, the Court recognized that, as the ultimate interpreter and protector of the Constitution, it must at times fill the vacuum created by the failure or refusal of the political branches to protect the civil rights of a distinct and politically powerless group of United States citizens. Chief Judge Torruella correctly noted in his Concurring opinion in Igartua II, that "the national disenfranchisement of (United States) citizens (residing in Puerto

Rico) ensures that they will never be able, through the political processes, to rectify the denial of their civil rights in those very political processes." The Government of the United States has not carried out its burden under the treaties, non under domestic law, to enfranchise its citizens residing in Puerto Rico. If this Supreme Court does not intervene here and now, all United States citizens residing in Puerto Rico will continue possessing an inferior type of American citizenship, government without consent, and will be the only ones in the Western Hemisphere, together with the citizens of Communist Cuba (liberated by U.S. in 1898), who cannot vote for their President.

This Court should also consider that the international obligations supporting appellants claim are not in controversy with domestic law as used in support of Petitioners claim. Moreover, consider that in September, 2005, The Commission on Federal Election Reform, supra pg. 9, recommended to the President not only the continuity of the practice of American election observers in other countries, but to open an unrestricted access of international observers to U.S. elections. Within this context, the treaties invoked are neither in controversy with U.S. applicable laws protecting citizens voting rights (Voting Rights Law, 42 U.S.C.A. 1971 et.seq.; or the 2002 Help America Vote Act), nor with U.S. Constitutional dispositions, Art. IV – Section 2, Amendments 1, 5, 12, 14, and 15). Federal statutes and the treaties invoked have the same normative rank under the Constitution. (Under U.S. Constitution Art. VI, as under Amendment XII.) (But see Brief - Annex A at pgs. 5a-7a)

Articulation of human rights norms on the international level can achieve little of practical value unless those norms are effective and enforceable on the domestic level. (See: "Justice Ginsburg and Foreign Court Decisions", G.U. – Sept. 22, 2005.) The position of the U.S. in this Complaint respecting its international human rights obligations has been full of contradictions. Similar contradictions by the US have been sanctioned. (Consider that the Inter-American Commission of Human Rights (IACHR) of the Organization of Americans States (OAS) found the United States Government in violation of the American Declaration of the Rights and Duties of Man, by denying congressional representatives to the American citizens of D.C. – Report No. 98/03 – Case 11.204, December 29, 2003.) The

District of Columbia is a territory as Puerto Rico, except that Puerto Rico for purposes of Presidential Elections meets the population required for a total of eight electors.

Only judicial declaratory and injunctive relief can remedy this condition and as requested in the Complaint. Analogal to Brown v. Board of Education, 347 U.S. 483 (1954), this Court can determine under 28 U.S.C.A 2201(a) in favor of Petitioners considering their voting rights "in light of the full development of democracy and its present place in American life throughout the Nation" (Id. pgs. 492-93.) Within this context Petitioners discriminatory denial of voting rights in Presidential elections while being American citizens since 1898, a condition of separate and unequal similar to that of black American citizens as in Plessy v. Ferguson (163 U.S. 537) should have no place in the United States. In Igartua II, (J. Pieras) the Court followed the line of judicial disposition in Brown. The Court ordered the government of Puerto Rico and of the U.S. to participate in the implementation of the Judgment. It is respectfully suggested to this Honorable Court to decide for Petitioners with a declaratory judgment with order of relief to be similarly implemented. As Hon. Judge Torruellas said:

> "....There comes a point when the courts must intervene to correct a great wrong, particularly one of their own creation, because the political branches of government cannot or will not act. See, e.g., Brown v. Bd. Of Educ., 347 U.S. 483. This case is such a crossroads in history. This court cannot further "avert its gaze," Sosa v. Alvarez Machain, 124 S. Ct. at 2764-65, without becoming an accomplice to this monumental injustice to Puerto Rico's nationally disenfranchised United States citizens...." (Brief - Annex A - pg. 65a-66a.)

CONCLUSION

For one hundred and seven (107) years, and 22 Presidential elections since Puerto Rico became part of the United States, the American citizens of Puerto Rico have been denied the right to vote in Presidential elections. The denial of voting in only one Presidential election constitutes irreparable injury. The Government of the United States, which claims to be the world

champion of democracy has not carried out its burden to enfranchise its American citizens residing in Puerto Rico. If this Supreme Court does not intervene here and now, all United States citizens residing in Puerto Rico will continue possessing an inferior type of American citizenship, and will continue to be subjected to government without consent. A condition of servitude, of Master (U.S.) and Servant (P.R.) will continue to prevail.

The rights of Petitioners, and of all the others similarly situated, can only be protected by a decree of this Court declaring that their discriminatory denial to vote in Presidential elections as American Citizens of Puerto Rico is unconstitutional under present federal constitutional judicial interpretation, legislative dispositions, and US Treaty obligations as previously cited herein and in the complaint, and by enjoining Respondent from performing any more acts or duties related to such discriminatory denial. Petitioners have no adequate remedy other than the judicial relief sought herein. Until this Court grants the judicial relief requested in the Complaint, Respondent will continue to deprive Petitioners of their voting rights. Only judicial declaratory and injunctive relief can remedy this condition and as requested in the Complaint.

REQUEST FOR RELIEF

In summary, Petitioners allege an injury by the denial of their right to vote in Presidential elections that is "fairly traceable to the Defendant's allegedly unlawful conduct which should be redressed by the requested relief." (Allen v. Wright, 468 U.S. 737, 751). Redressability addresses whether the Court's decision will make a difference, (see Warth v. Seldin, 422 U.S. 490, 505 (1975)), and calls for the determination of whether the injury alleged is fairly traceable to the government conduct against Petitioners.

It is within the context of Respondent's domestic and international obligations in this Petition and of present national voting rights policy interpretations and practice cited in this Petition, that it is respectfully requested from this Honorable Supreme Court to consider this Petition for Certiorari, to vacate the judgment of the District Court and of the Appeals Court "en banc", and to grant Petitioners, and all similarly situated, the declaratory judgment and relief requested in the Complaint to eliminate their

107 YEAR state of servitude in relation to federal government by consent, and to declare and order their right to vote in Presidential elections, starting in the November, 2008 Presidential Elections.

WHEREFORE, in light of the foregoing reasons, this petition should be granted. It is very respectfully requested from this Honorable Supreme Court to:

1) Declare that the rights of Petitioners, and of all the others similarly situated, can only be protected by a decree of this Court declaring that their discriminatory denial to vote in Presidential elections as American citizens of Puerto Rico is unconstitutional under present federal judicial interpretation, legislative dispositions, and US treaty obligations, and by enjoining Respondent from performing any more acts or duties related to such discriminatory denial.

2) Declare that the United States Citizens residing in Puerto Rico have the right to vote in Presidential elections so that their eight electoral votes be counted in Congress. (Population according to 2000 Census.)

3) Grant such declaratory and injunctive relief from this Court as may be proper to assure them, and all others similarly situated, due process and the equal protection of the laws which now and for more than a century have been denied to them by the United States in Presidential elections.

4) Order the transfer of this case with this Courts' Judgment to the Federal District Court of Puerto Rico, so that it takes all necessary legal measures to implement it, and to this effects order the appearance to the Court of the Solicitor General of Puerto Rico and of the Federal District Attorney.

5) Oral argument is respectfully requested by Petitioners.

RESPECTFULLY SUBMITTED,

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USDC ATTY.NO. 130712

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2005, I served three copies of this Petition for Certiorari as required by Rule 29 (4)(a) of this Court, and three copies of Appendix to be mailed, by overnight delivery, to:

Solicitor General of the United States
Room 5614,
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

One copy of this Petition of Certiorari and one copy of Appendix has been also served to:

Gregory G. Katzas
U.S. Department of Justice
Civil Division
Federal Programs Branch, Room 6116
20 Massachusetts Ave., N.W.,
Washington, D.C. 20530

A copy of the Petition and an Appendix has also been served to the Secretary of the Organization of American States, since this case involves the violation of human rights, of democratic rights, by Defendant to all the American citizens of Puerto Rico (4 million citizens). Particularly, the Complaint claims democratic rights under the OAS Democratic Charter, signed by all member States in 2001, including the United States, Defendant.

– A copy of the brief and annexes has also been served to the Secretary of the United Nations Human Rights Committee created under the Treaty – Covenant of Political and Civil Rights, which the complaint claims Defendant is in violation of its obligations related to democratic rights of the citizens of the signatory country, in this case those of Petitioners.

ANNEXES

ANNEX A

United States Court of Appeals
For the First Circuit

No. 04-2186

GREGORIO IGARTÚA-DE LA ROSA, ET AL.,

Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, U.S. Senior District Judge]

Before

Boudin, Chief Judge,

Campbell, Senior Circuit Judge,

Torruella, Selya, Lynch, Lipez and Howard, Circuit Judges.

Gregorio Igartúa-de la Rosa for appellants.

Francisco J. Domenech with whom Angel J. Vargas-Carcaña, Office of the Legal Counsel & Federal Affairs for the President, Senate of Puerto Rico, was on brief for the Senate of the

Commonwealth of Puerto Rico and its President, the Honorable Kenneth D. McClintock, Amicus Curiae.

Richard H. Fallon, Jr. with whom José A. Fuentes-Agostini, Reed Smith LLC, John M. García, García & Fernández PSC, Joaquín A. Márquez, Philip J. Mause and Drinker Biddle & Reath LLP were on brief for the Puerto Rican-American Foundation, joined by the Republican Party of Puerto Rico, Amici Curiae.

Amy B. Abbott, Kirkpatrick & Lockhart Nicholson Graham LLP, Glenn R. Reichardt, Shanda N. Hastings, Kirkpatrick & Lockhart Nicholson Graham LLP on brief for Dick Thornburgh and Citizens' Educational Foundation-US, Amici Curiae.

Gael Mahony, Stephen S. Young, Martha Born, Holland & Knight LLP and Israel Roldán-González on brief for Israel Roldán-González, Amicus Curiae.

Gregory G. Katsas, Deputy Assistant Attorney General, with whom Peter D. Keisler, Assistant Attorney General, H.S. García, United States Attorney, Michael Jay Singer and Matthew M. Collette, Appellate Staff, Civil Division, Department of Justice, were on brief for appellee.

August 3, 2005

OPINION EN BANC

Boudin, Chief Judge. This case brings before this court the third in a series of law suits by Gregorio Igartúa, a U.S. citizen resident in Puerto Rico, claiming the constitutional right to vote quadrennially for President and Vice President of the United States. Panels of this court have rejected such claims on all three occasions.[1] We now do so again, this time en banc, rejecting as well an adjacent claim: that the failure of the Constitution to grant this vote should be declared a violation of U.S. treaty obligations.

The constitutional claim is readily answered. Voting for President and Vice President of the United States is governed neither by rhetoric nor intuitive values but by a provision of the Constitution. This provision does not confer the franchise on "U.S. citizens" but on "Electors" who are to be "appoint[ed]" by each "State," in "such Manner" as the state legislature may direct, equal to the number of Senators and Representatives to whom the state is entitled. U.S. Const. art. II, § 1, cl. 2; see also id. amend. XII.

At one time state legislatures chose the electors themselves, see McPherson v. Blacker, 146 U.S. 1, 28-35 (1892); in the modern manner, customarily a U.S. state provides that its own citizens--citizens of that state--vote for the electors to represent that state. Modern ballots may omit the names of the electors and list only the candidates, so in form it appears that citizens are voting for President and Vice President directly. But they are not: they are voting for electors and, more pertinent here, the electors are electors of the states.

Puerto Rico--like the District of Columbia, the Virgin Islands, and Guam--is not a "state" within the meaning of the Constitution. Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 7 (1st Cir. 1992). Puerto Rico was not one of the

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[1] Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) ("Igartúa I"); Igartua de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) ("Igartúa II"); Igartúa-de la Rosa v. United States, 386 F.3d 313 (1st Cir. 2004) ("Igartúa III"). The panel in Igartúa III vacated its own decision and granted panel rehearing, 404 F.3d 1 (1st Cir. 2005); and this court then granted en banc review, 407 F.3d 30 (1st Cir. 2005).

original 13 states who ratified the Constitution; nor has it been made a state, like the other 37 states added thereafter, pursuant to the process laid down in the Constitution. U.S. Const. art. IV, § 3, cl. 1. Nor has it been given electors of its own, as was the District of Columbia in the Twenty-Third Amendment.

Puerto Rico became associated with the United States as an unincorporated territory under Article IV of the Constitution following the 1898 war between this country and Spain. U.S. Const. art. IV, § 3, cl. 2; see Insular Cases, 182 U.S. 1 (1901). Its status has altered over the ensuing period, culminating in an agreement in 1952, approved by the citizens of Puerto Rico, that Puerto Rico should have a unique "Commonwealth" status; but the unique status is not statehood within the meaning of the Constitution. See Trailer Marine, 977 F.2d at 7; Igartúa II, 229 F.3d at 87-88 & nn.15-16 (Torruella, J., concurring). And, in recent elections, Puerto Ricans themselves have been substantially divided as to whether to seek statehood status. Cf. Rossello-Gonzalez v. Calderon-Serra, 398 F.3d 1, 4-5 (1st Cir. 2004).

As Puerto Rico has no electors, its citizens do not participate in the presidential voting, although they may do so if they take up residence in one of the 50 states and, of course, they elect the Governor of Puerto Rico, its legislature, and a non-voting delegate to Congress. Like each state's entitlement to two Senators regardless of population, the make-up of the electoral college is a direct consequence of how the framers of the Constitution chose to structure our government--a choice itself based on political compromise rather than conceptual perfection. Note, Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote, 114 Harv. L. Rev. 2526, 2526-31 (2001) (discussing historical commentary).

That the franchise for choosing electors is confined to "states" cannot be "unconstitutional" because it is what the Constitution itself provides. Hence it does no good to stress how important is "the right to vote" for President. Although we recognize the loyalty, contributions, and sacrifices of those who are in common citizens of Puerto Rico and the United States, much the same could have been said about the citizens of the District of Columbia, who were voteless over a much longer period. The path to changing the Constitution lies not through the courts but through

the constitutional amending process, U.S. Const. art. V; and the road to statehood--if that is what Puerto Rico's citizens want--runs through Congress. U.S. Const. art. IV, § 3, cl. 1.

This court has thrice rejected the constitutional claim now advanced by Igartúa. The Ninth Circuit reached the same result in a similar suit concerning Guam. Attorney General of the Territory of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984). The Supreme Court denied certiorari in both Igartúa I, 514 U.S. 1049 (1995), and in the Ninth Circuit case, 469 U.S. 1209 (1985). Igartúa has offered nothing new in this third case to support his constitutional claim. In this en banc decision, we now put the constitutional claim fully at rest: it not only is unsupported by the Constitution but is contrary to its provisions.

Igartúa's complaint also relied upon U.S. treaties--technically, two of the three are not treaties--as a premise for the suffrage right claimed.[2] This theory had been advanced and rejected by this court in Igartúa I, 32 F.3d at 10 n.1, which was binding on the panel and could not be altered by it. Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 160 & n.4 (1st Cir. 2004). After the panel granted rehearing in this case to examine a more elaborate version of the treaty argument, the en banc court determined that the matter should be heard by the full court. Two of the three panel members said that they were content with this course. Only one judge dissented from the proposal to hear the case en banc. See Igartúa de la Rosa, 407 F.3d 30.

No treaty claim, even if entertained, would permit a court to order that the electoral college be enlarged or reapportioned. Treaties--sometimes--have the force of domestic law, just like legislation; but the Constitution is the supreme law of the land, and

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[2]The first two of the three documents are not "treaties" in the constitutional sense, being instead aspirational documents never submitted by the President for Senate ratification. U.S. Const. art. II, § 2, cl. 2. Neither is listed in the State Department's current "treaties in force" list. U.S. Department of State, Treaties in Force 2004, at www.state.gov/s/l/38294.htm. For convenience, we ignore the distinction because it does not affect the result in this case.

neither a statute nor a treaty can override the Constitution. Reid v. Covert, 354 U.S. 1, 16-18 (1957) (plurality opinion); Matter of Burt, 737 F.2d 1477, 1484 (7th Cir. 1984); Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983) (collecting case law). See also Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 180 (1803) ("a law repugnant to the constitution is void"). So the treaty claim, originally made in support of injunctive relief, is now recast by proponents as a demand for "a declaration" that the United States is in violation of its treaty obligations for failing to "take steps" to give a presidential vote to citizens of Puerto Rico.

There are a host of problems with the treaty claim, including personal standing, redressability, the existence of a cause of action, and the merits of the treaty interpretations offered. Treaties are made between states (in the international usage of that term) and citizens do not automatically have a right to sue upon them.[3] The present claim is also probably not justiciable in the sense that any effective relief could be provided;[4] it is enough to let common sense play upon the conjecture that the Constitution would be amended if only a federal court declared that a treaty's generalities so required. See Simon, 426 U.S. at 44 ("unadorned speculation [as to redress] will not suffice to invoke the federal judicial power").

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[3]See United States v. Li, 206 F.3d 56, 60-61 (1st Cir. 2000) (en banc) ("[T]reaties do not generally create rights that are privately enforceable in the federal courts" (citing Head Money Cases, 112 U.S. 580, 598 (1884)); id. at 61 ("presumption against private rights of action under international treaties").

[4]Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (unless injury is "likely to be redressed by a favorable decision," federal court's exercise of power "would be gratuitous and thus inconsistent with the Art. III limitation"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)(redressability must not be "speculative"). See also Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103-04, 103 n.5 (1998) (redressability at "core" of Article III).

Nor are the merits of Igartúa's reading of the treaties at all straightforward. The language of each of the treaties invoked is general. Nothing in them says anything about just who should be entitled to vote for whom, or that an entity with the negotiated relationship that the United States has with Puerto Rico is nevertheless required to adopt some different arrangement as to governance or suffrage. In 1951, Puerto Ricans themselves acceded to their present Commonwealth status,[5] and they are today divided as to what relationship they would prefer on the spectrum from statehood to Commonwealth status to independence.

We think it unnecessary to plumb these questions, whether of preconditions to suit or the meaning of the treaties, because none of these treaties comprises domestic law of the United States and so their status furnishes the clearest ground for denying declaratory relief. It is well settled that declaratory relief is discretionary, Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995), but discretion does not mean anything that a judge feels like doing. Rather,

> the discretion to grant declaratory relief is to be exercised with great circumspection when matters of public moment are involved, . . . or when a request for relief threatens to drag a federal court prematurely into constitutional issues that are freighted with uncertainty.

Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 535 (1st Cir. 1995).

It would not be "circumspection" but patent imprudence to "declare" purported rights under the treaties at issue in this case.

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[5]See G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at 26 (1953) (United Nations General Assembly, upon formation of "political association" between United States and Puerto Rico, "[r]ecognizes that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status" and "that, when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination").

The United States has signed numerous treaties over the years, many containing highly general and ramifying statements. Some as negotiated by the President are merely aspirational and not law in any sense. Others may comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms. The law to this effect is longstanding. See Whitney v. Robertson, 124 U.S. 190, 194 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

The treaties in question here do not adopt any legal obligations binding as a matter of domestic law. The Universal Declaration of Human Rights is precatory: that is, it creates aspirational goals but not legal obligations, even as between states. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004). This is also true of the Inter-American Democratic Charter.[6] The final instrument, the International Covenant on Civil and Political Rights, is a ratified treaty but was submitted and ratified on the express condition that it would be "not self-executing." 138 Cong. Rec. S4781, S4784 (daily ed. Apr. 2, 1992). Indeed, Sosa used it as an example of such a treaty, saying:

> Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.

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[6]See Remarks of U.S. Ambassador Roger Noriega at Organization of American States Permanent Council Meeting (Sept. 6, 2001), in Digest of United States Practice in International Law: 2001 at 347, Office of the Legal Advisor, U.S. Department of State (Sally J. Cummins & David P. Stewart eds., 2001) ("[T]he United States understands that this Charter does not establish any new rights or obligations under either domestic or international law.").

124 S. Ct. at 2763.

Whatever limited room there may be for courts to second-guess the joint position of the President and the Senate that a treaty is not self-executing--and we are pretty skeptical of such a suggestion in light of "the discretion of the Legislative and Executive Branches in managing foreign affairs," id.--it is certainly not present in a case in which the Supreme Court has expressed its own understanding of a specific treaty in the terms block quoted above. Indeed, only a few pages later Sosa repeated: "[T]he United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." Id. at 2767.

When the President negotiates a precatory agreement or a non-self-executing treaty, and when Congress refuses to adopt implementing legislation for a non-self-executing treaty, both are performing functions entrusted to them by the Constitution. U.S. Const. art. I, §§ 1, 8-10; art. II, §§ 2-3. It would ignore, and undermine, this constitutional allocation of functions for a federal court to declare that the United States was nevertheless "violating" such a treaty. In substance, such an exercise would attempt to do what the President and Congress have declined to do, namely, to deploy the treaty provision in an attempt to order domestic arrangements within the United States.

This intrusive course could also embarrass the United States in the conduct of its foreign affairs, which is "committed by the Constitution to the executive and legislative--'the political'--departments of the government." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). Whatever the State Department might later say, such a declaration by a federal court of a supposed "treaty obligation" could be trumpeted as propaganda in international bodies and elsewhere. This is a legitimate concern in considering whether "discretion" should be exercised to grant declaratory relief.[7] Of course, no such

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[7]See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412, 431-33 (1964) (weighing possibility of "embarrassment to the Executive Branch in handling foreign affairs"); Baker v. Carr, 369 U.S. 186, 217 (1962) ("potentiality of embarrassment from

declaration would confer a presidential vote on Igartúa: it would merely reinforce the disturbing view that judges have no proper notion of where their own authority ends.

The case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means. But the right claimed cannot be implemented by courts unless Puerto Rico becomes a state or until the Constitution is changed (as it has been, at least five times, to broaden the franchise). U.S. Const. amend. XV (race, color, previous servitude); id. amend. XIX (sex); id. amend. XXIII (District of Columbia); id. amend. XXIV (payment of poll or other tax); id. amend. XXVI (age eighteen and older). It certainly should not be "declared" by a federal court on the basis of treaties none of which was designed to alter domestic law--and none of which could override the Constitution.

Little need be said of Igartúa's related claim that customary international law, by itself and independent of treaties, requires that he be allowed to vote for President. Although sometimes said by enthusiasts to be law like other law, customary international law is a diffuse and often highly uncertain body of norms whose force and enforceability vary greatly even in the international sphere; and its status in our domestic courts is even more qualified. See Sosa, 124 S. Ct. at 2762-63, 2768-69.

Only recently, in Sosa, the Supreme Court enjoined great caution in importing such norms into domestic law, even in the context of a federal statute governing alien tort actions that arguably authorized some degree of importation by federal courts. Sosa refused to recognize as a norm of customary international law the notion of protection against arbitrary arrest. 124 S. Ct. at 2769. Yet the claim rejected in Sosa was a model of precision compared to Igartúa's present claim.

No serious argument exists that customary international law, independent of the treaties now invoked, requires a particular form of representative government. Practice among leading

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multifarious pronouncements by various departments on one question" relevant to justiciability). See also United States v. Lee, 106 U.S. 196, 209 (1882).

democratic nations shows a diversity as to how governments organize and structure the franchise; in Great Britain, for example, neither the head of state nor of government is directly elected by the public at large. If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law. Sosa, 124 S. Ct. at 2768 n.27.

Finally, other supporters of Igartúa's claim suggest that the United States need not "amend the Constitution" to resolve the asserted infirmity of having Puerto Ricans classed as citizens of the United States but unable to vote for President. For example, Puerto Rico could be made a state or, alternatively, could be recognized as an independent nation. Granting the declaration, it is claimed, would encourage the United States to "take steps" toward a resolution even if it did not immediately secure a vote for Igartúa.

This is, of course, nothing but speculation, but it further underscores the impropriety of the judicial declaration sought. The main impact of such an abstract declaration, if any, would be to serve partisans in a political campaign as to the choice between statehood, independence, Commonwealth status, or other altered arrangements between Puerto Rico and the United States. Changes to the Constitution and the present status of Puerto Rico are not the province of federal judges, nor are they dictated by international law; those changes can only be adopted as set forth in the Constitution and laws of the United States.

Affirmed.

Concurring and dissenting opinions follow.

CAMPBELL, Senior Circuit Judge, concurring. I join in Chief Judge Boudin's excellent opinion for the majority, but I also note my subscription to Judge Lipez's narrower concurrence. The two are not in conflict. The majority's opinion recognizes the possible validity of Judge Lipez's belief that the court here lacks jurisdiction to grant declaratory relief. I happen to think Judge Lipez is right, and, if so, that of course ends the matter. But even apart from the correctness of his approach, I agree with Chief Judge Boudin's alternative analysis which leads to the same outcome.

LIPEZ, Circuit Judge, concurring in the judgment. I agree with the majority's denial of relief to Igartúa. I write separately, however, because I would reject Igartúa's request for declaratory relief on jurisdictional grounds.

I.

I am sympathetic to the aspirations of Puerto Ricans who are citizen residents of Puerto Rico to participate fully in the election of the President and Vice President of the United States. The dissenting judges present their legal positions in support of those aspirations powerfully and eloquently. Nevertheless, "[f]ederal courts are courts of limited jurisdiction," Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), and that limited jurisdiction does not permit us to decide the issues raised by Igartúa's request for declaratory relief.

It may seem odd to some that a federal court might not have the power to answer important legal questions involving the interaction between the Constitution, international law, and the rights of American citizens. But, as I will explain below, one cannot simply go to federal court and get an answer to a legal question. Before a federal court can resolve the issues before it, the court must first satisfy itself that, if the plaintiff ultimately won, the decision would probably result in a redress of the plaintiff's grievance. If a judicial victory would probably not produce such a result, the federal court has no power to address the merits of the issues underlying the dispute. In most cases redressability is not a problem. In this case, however, redressability is an insuperable problem.

As the majority ably explains, there are only two methods under our Constitution by which a territory can receive electoral votes: through admission as a state, see U.S. Const. art. IV, § 3, cl. 1, or by special amendment, see id. amend. XXIII. For all practical purposes, only Congress can perform either of these actions, and whether to do so is in Congress's sole discretion.[8] Thus the critical

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[8]There is an exception, in theory: if two-thirds of state legislatures so request, Congress must convene a Constitutional convention. See U.S. Const. art. V. However, no such convention has ever been convened since the adoption of the Constitution.

jurisdictional question reduces to whether a court can declare Congress's failure to initiate either of these processes to be a violation of international law -- or, as Judge Torruella puts it, whether a court can issue a declaratory judgment that "the United States has taken no steps to meet its obligations under the ICCPR and customary international law to grant equal voting rights to all citizens in the election of the President and Vice President of the United States." Post at 88 (Torruella, J., dissenting).

In my view, the answer to this jurisdictional question does not turn on the precise contents of the particular agreements at issue; whether the agreements are binding or merely "precatory"; whether they have been ratified by the Senate; whether they are self-executing; or even whether the relevant international legal norms derive from agreements at all, as opposed to customary law. Nor does the answer turn on the discretionary nature of a declaratory judgment. Even if those factors were removed, Igartúa's request for declaratory relief would still face an insuperable obstacle: we lack jurisdiction to decide his international law claim because his grievance is not judicially redressable. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (court must address Article III jurisdictional questions before addressing merits, because "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion"). Unavoidably, Igartúa's request for a declaratory judgment requires unsupportable speculation about the possibility of a Constitutional amendment or the admission of Puerto Rico as a state. For this reason alone, I conclude that we do not have jurisdiction over his request for declaratory relief.

II.

Under Article III of the Constitution, "[t]he judicial Power shall extend" to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. The Supreme Court has interpreted this "case or controversy" requirement to mean, among other things, that federal courts do not issue advisory opinions. In particular, a federal court may only exercise jurisdiction over an action if it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Simon v. E. Ky. Welfare Rights

Org., 426 U.S. 26, 38, 43 (1976)). If the plaintiff cannot show that his injury "is likely to be redressed by a favorable decision," the federal court's "exercise of its power . . . would be gratuitous and thus inconsistent with the Art. III limitation." Simon, 426 U.S. at 38. This limitation applies with undiminished force to actions for declaratory judgment. See Calderon v. Ashmus, 523 U.S. 740, 745 (1998) ("[W]e must first address whether this action for a declaratory judgment is the sort of 'Article III' 'case or controversy' to which federal courts are limited."); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (The Declaratory Judgment Act "is operative only in respect to controversies which are such in the constitutional sense.").

This is not a case where a plaintiff claims injury from an allegedly unconstitutional act of Congress. Rather, Igartúa claims injury from Congress's inaction in the face of certain international agreements: its failure to either admit Puerto Rico as a state or to propose a Constitutional amendment allocating electors to Puerto Rico.[9] Since it is beyond dispute that we could not order Congress to do either of those things, Judge Torruella says that we should issue a declaratory judgment that Congress has not fulfilled its

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[9]The dissents suggest that there might be other alternatives by which Congress could grant the Presidential vote to residents of Puerto Rico. The only specific suggestion is one first advanced by Judge Leval in Romeu v. Cohen, 265 F.3d 118, 128-30 (2d Cir. 2001) (Leval, J., writing separately), under which Congress would require each state to accept a proportional share of territorial voters. See post at 89 (Howard, J., dissenting). This suggestion has been critiqued on the ground that there is "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." Romeu, 265 F.3d at 121 (Walker, Jr., C.J., concurring); see also id. at 136 (Walker, Jr., C.J., concurring) ("I see only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment."). At any rate, for purposes of redressability analysis, it is no more likely that Congress would adopt Judge Leval's suggestion (which is probably not Constitutionally permissible) than one of the two alternatives that the Constitution provides.

duties under international agreements. Judge Torruella then says that Congress, chastened by this declaration, would voluntarily choose to act -- presumably either by admitting Puerto Rico as a state or proposing an amendment similar to the Twenty-third. In Judge Torruella's view, "it is substantially likely that a declaration by this Court that the United States is in violation of international law will result in some form of relief to the United States citizens who reside in Puerto Rico." Post at 80 (Torruella, J., dissenting).

Respectfully, the basis for this speculation about Congress initiating the process of Constitutional amendment or invoking the Constitutional process for the admission of a new state is unexplained. We have already warned about the hazards of such speculation when only statutory changes by a state legislature were at stake. In Biszko v. RIHT Financial Corp., 758 F.2d 769 (1st Cir. 1985), plaintiffs challenged a Rhode Island statute that arguably created market conditions under which plaintiffs could not receive full market value for their shares in a Rhode Island bank.[10] They argued that their suit was redressable because if the federal court invalidated the statute, "the Rhode Island legislature would soon be moved, sua sponte or by the persuasive efforts of non-New England banks, to pass a statute permitting [a more competitive market]." Id. at 773. We described such speculation concerning "a benefit that [plaintiffs] might gain were the Rhode Island legislature to react in a certain way to a decision by this court" as "not merely speculative" but "positively chimerical." Id.[11]

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[10]The statute permitted a Rhode Island bank to be acquired by an out-of-state bank, but only if the other bank was based in another New England state. The plaintiffs were shareholders of a Rhode Island bank that had agreed to merge with a Massachusetts bank, and they sought to block the merger. See id. at 770-71. They argued that the limitation to New England banks reduced competition and that, without that restriction, an out-of-state bank would have had to pay more for their stock. See id. at 771.

[11]We analyzed this argument under the rubric of the "injury" requirement, but our reasoning on that point applies to the redressability requirement.

If a legislative body would be within its rights to ignore the court's decision, and the plaintiff cannot convince the court that it is "'likely,' as opposed to merely 'speculative,'" Lujan, 504 U.S. at 561, that the legislature will react in the way that he hopes, the redressability requirement has not been met. Cf. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."). The cases that Judge Torruella cites for the contrary proposition (that Congress would be "substantially likely" to redress Igartúa's grievance in light of a judicial declaration) are easily distinguishable and actually reveal why the redressability requirement prevents declaratory relief here.

Judge Torruella relies on Utah v. Evans, 536 U.S. 452 (2002), a dispute ultimately stemming from the Census Bureau's method of calculating population in the 2000 census. The Bureau used a statistical method that calculated the population of Utah as somewhat lower, relative to the population of North Carolina, than if the Bureau had not used that method. See id. at 457-58. Pursuant to statute, the Bureau's final report was formally transmitted to Congress, and the Clerk of the House of Representatives then transmitted to each state governor "'a certificate of the number of Representatives to which [that] State [was] entitled.'" Id. at 461 (quoting 2 U.S.C. § 2a(b)). Due to the statistical method that the Bureau used, Utah received one less representative, and North Carolina one more representative, than if the Bureau had not used that method. Id. at 458. After receiving the results, Utah sued the government, arguing that the Bureau's statistical method violated another census-related statute, and sought an injunction ordering the Bureau to reissue its report with different results. Id. at 459.

North Carolina intervened, arguing that the case was not justiciable because the relief sought would not redress Utah's grievance. Although North Carolina "[did] not deny that the courts [could] order the [Bureau] to recalculate the numbers and to recertify the official census result," it reasoned that "Utah

suffer[ed], not simply from the lack of a proper census 'report' (a document), but more importantly from the lack of the additional congressional Representative to which North Carolina believes itself entitled as a consequence of the filing of that document." Id. at 461. In other words, although the court could order a new census report as Utah requested, a new report would not result in Utah gaining a Representative. That outcome would depend entirely on whether Congress, acting in its unbridled discretion, would choose to reapportion, or just ignore the report.

The Court concluded that the injury cited by Utah was redressable:

> [W]e believe it likely that Utah's victory here would bring about the ultimate relief that Utah seeks. Victory would mean a declaration leading, or an injunction requiring, the Secretary to substitute a new "report" for the old one. Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post-2000 census congressional election. Under these circumstances, it would seem . . . "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute...."

Id. at 463-64 (quoting Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (opinion of O'Connor, J.)). Two points about Evans bear emphasis. First, compliance with the actual court order or declaration relating to the need for a new census report "would be purely mechanical." 536 U.S. at 463. Second, while ultimate redress of Utah's grievance would require discretionary action by elected officials, that action -- recertifying the total number of Representatives for two states -- was of a piece with a process so regular and commonplace that Congress has, in ordinary circumstances, delegated it by statute to the Clerk of the House.[12]

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[12]After Congress receives the statement listing the number

Here, by contrast, the Congressional action envisioned (admitting a state or initiating the process of Constitutional amendment) is exceptional, lengthy, complex, and highly uncertain. Consequently, how Congress would react to a declaration is considerably more speculative here than in Evans.[13]

A second case cited by Judge Torruella, Juda v. United States, 13 Cl. Ct. 667 (1987), relates more directly to international agreements. Juda concerned the status of the Marshall Islands. After World War II, the United States entered into an agreement with the United Nations (UN) to administer the Marshall Islands as a UN trusteeship, in an arrangement designed to be temporary. In the 1970s, the United States decided to terminate the trusteeship and offer the territory a compact of free association. The compact agreement was submitted to a plebiscite, and was resoundingly approved. Congress then enacted, and the President signed, legislation formally adopting the compact. After the President issued an executive order implementing the compact, the UN Trusteeship Council determined that the trusteeship had terminated. See id. at 671-76.

Some years later, Marshall Islander plaintiffs filed a claim against the United States under the Tucker Act, 28 U.S.C. § 1491,[14] which had undisputedly applied to the Islands while they

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of representatives to which each state is entitled, "[i]t shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. § 2a(b).

[13]Moreover, one of the two methods of redress contemplated -- Constitutional amendment -- would require action not just by Congress, but also the legislatures of thirty-eight states. See U.S. Const. art. V.

[14]The Tucker Act grants jurisdiction to the Court of Federal Claims (then known as the Claims Court) for claims against the United States, and provides the government's consent to such suits.

were still under the trusteeship. The United States argued, however, that the compact agreement withdrew the government's waiver of sovereign immunity. See 13 Cl. Ct. at 677. The plaintiffs responded that, under the rules applicable to UN trusteeships, the trusteeship had not been validly terminated, and therefore the compact -- which withdrew the government's consent to suit -- never took effect. See id. at 678.

The court rejected the plaintiffs' argument that failure to terminate the trusteeship properly meant that the compact (and with it the withdrawal of consent to suit) had never taken effect. Rather, the court found that whether "the Trusteeship Agreement has not been terminated de jure does not resolve the issue of whether the Compact . . . is in effect." Id. at 682. Ultimately, the court concluded that the compact did take effect, and therefore that the United States had withdrawn its consent to be sued. See id. at 683, 690. Thus, it dismissed the complaint. Id. at 690.

Nevertheless, in a lengthy dictum, the court explained that the trusteeship had in fact not been properly terminated. The court held that the trusteeship could not be formally terminated until the UN Security Council so voted. See id. at 678-82. Some time after the Juda decision issued, the government took the court's advice and formally asked the Security Council to terminate the trusteeship, which it did. See United Nations Security Council Resolution 683 (Dec. 22, 1990). That dictum, and the government's decision to take the court's advice, is the precedent upon which Judge Torruella relies.

Yet the Juda court did not "declare" anything -- it dismissed the plaintiffs' complaint, did not even mention a declaratory judgment, and is cited by Judge Torruella only for a dictum. More importantly, in Juda there was no dispute that both Congress and the President intended to terminate the trusteeship; indeed, by enacting the compact and issuing an executive order implementing it, the political branches thought they had done exactly that. Juda noted that these actions did not have their intended effect due to a technical misunderstanding of UN procedures, and explained how the elected branches could properly achieve what they had already sought to do. The likelihood that Congress and the President would follow the court's advice was

not just "substantial," it was a near certainty. There is nothing remotely approaching such certainty here.[15]

III.

There is no precedent for issuing a declaratory judgment in the circumstances of this case, and for good reason. A declaratory judgment "is a procedural device that provides a new, noncoercive remedy . . . in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy . . . and in cases in which a party who could sue for coercive relief has not yet done so." B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1428 (Fed. Cir. 1997) (emphasis added). Here, however, no coercive remedy would ever be available. Congress would be perfectly within its rights to ignore whatever a federal

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[15]A third case cited by Judge Torruella, Federal Election Commission v. Akins, 524 U.S. 11 (1998), does not involve the likelihood of action by Congress. Akins was a petition for review of an administrative agency's dismissal of an administrative complaint. See id. at 18. The agency's governing statute specifically authorized judicial review of an agency's decision not to take certain action, see 2 U.S.C. § 437g(a)(8)(A), and provided that the district court "may declare that the dismissal of [a] complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days," id. § 437g(a)(8)(C). Thus, Akins involved an administrative agency which Congress placed under unusually close judicial oversight, even extending to the agency's exercise of prosecutorial discretion, for which every declaration was potentially accompanied by a coercive order "to conform with such declaration within 30 days." We are not dealing in this case with a subordinate government agency, created by statute, with carefully crafted provisions for substantive judicial review over the agency's decision to do nothing. Rather, the party whose inaction Igartúa complains of is Congress itself, a coequal branch of government that is Constitutionally free to ignore any potential declaration that it should or must perform various actions entrusted to its sole discretion by the Constitution itself. The redressability analysis in Akins does not apply to this case.

court said. The court's declaratory judgment would be, in essence, an advisory opinion.

> As the Supreme Court explained in a different context:
> In all civil litigat. n, the judicial decree is not the end but the means. At the d of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces -- the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement -- what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion -- is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.

Hewitt v. Helms, 482 U.S. 755, 761 (1987) (describing test for "prevailing party" under 42 U.S.C. § 1988). Here there is only hope and speculation that Congress, in response to a declaratory judgment about a violation of international law, would invoke cumbersome and contentious processes relating to Constitutional amendments or the admission of a new state to eventually give citizen residents of Puerto Rico the right to vote for President and Vice President. Such hope and speculation does not satisfy the "case or controversy" requirement of Article III. On that basis alone, I would decline to exercise jurisdiction over Igartúa's request for declaratory relief.

TORRUELLA, Circuit Judge (dissenting).[16] In its haste to "put [plaintiffs-appellants'] constitutional claim fully at rest,"[17] maj. op. at 6, the majority has chosen to overlook the issues actually before this en banc court as framed by the order of the rehearing panel, see Igartúa de la Rosa v. United States, 404 F.3d 1 (1st Cir. 2005) (order granting panel rehearing), which panel the en banc court suppressed, but whose order was adopted as establishing the parameters of the issues to be decided by the en banc court. See Igartúa de la Rosa v. United States, 407 F.3d 30, 31 (1st Cir. 2005) (converting to en banc review panel rehearing in which "the parties [are] to address two issues: first, the plaintiffs' claim that the United States was in default of its treaty obligations and, second, the availability of declaratory judgment concerning the government's compliance with any such obligations."). It is these issues that the parties were asked to brief. Instead the majority has sidetracked this appeal into a dead end that is no longer before us: Puerto Rico's lack of electoral college representation, see U.S. Const. art. II, § 1, cl. 2, and our lack of authority to order any constitutional change to such status by reason of that constitutional impediment.

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[16]I acknowledge the participation of amici, whose briefs contributed to the clarification of various important issues. I regret that not all amici were granted the opportunity to express themselves at oral argument.

[17]Is this the constitutional equivalent of "rest in peace"? Of course, if Judge Lipez and Judge Campbell are correct that we lack jurisdiction to consider plaintiffs' claim, then the majority's various conclusions on the merits would be mere dicta, lacking any precedential value. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 7 Wall. 506, 514, 19 L.Ed. 264 (1868) (quoted in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998)). Furthermore, if the concurring opinion is correct, the majority is issuing an advisory opinion of the same kind that Judge Lipez claims results from the declaratory judgment that I propose.

In doing so, the majority fails to give any weight to the fundamental nature of the right to vote, and the legal consequences of this cardinal principal. Under the combined guise of alleged political question doctrine, its admitted desire to avoid "embarrassment" to the United States, and its pious lecturing on what it deems to be the nature of the judicial function, the majority seeks to avoid what I believe is its paramount duty over and above these stated goals: to do justice to the civil rights of the four million United States citizens who reside in Puerto Rico. The majority labels this duty with despect as "rhetoric" and "intuitive values." Maj. op. at 3. I beg to differ, and so, I suspect, do a considerable number of those four million U.S. citizens who, lacking any political recourse, look to the courts of the United States for succor because they are without any other avenue of relief. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and . . . may call for correspondingly more searching judicial inquiry.").[18]

Considering that justice and equity are the handmaidens of the law, I believe it is the duty of this court to exercise its equitable power under the Declaratory Judgment Act, 28 U.S.C. § 2201(a),[19]

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[18]Reducing the majority and concurring opinions to their bare bones, the former leaves the four million nationally disenfranchised United States citizens residing in Puerto Rico to claim their rights through a nonexistent political forum, while the latter deny an existing judicial forum the authority to state the actuality of an undeniable fact. Both outcomes leave the citizens in question in an unjust legal limbo.

[19]The Act states that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

in its decision of the issues that are properly before the en banc court, and to declare that the United States has failed to take any steps to meet obligations that are cognizable as the supreme law of the land[20] regarding plaintiffs-appellants' voting rights. "This is of the very essence of judicial duty." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

Because I believe that the majority fails to meet this duty, I respectfully dissent.

I.

A. How did we come to this state of affairs?

On July 25, 1898, in the closing days of the Spanish-American War, the United States invaded[21] Puerto Rico. At that

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[20] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[21] In what must be the height of euphemism, the majority refers to this turn of events as Puerto Rico's becoming "associated" with the United States. Maj. op. at 4. A similar, but more pernicious, mischaracterization follows its description of the congressional enactments that authorized local self-government for Puerto Rico, which the majority calls an "agreement" for a "unique 'Commonwealth' status," id., and which the majority states resulted in the current "negotiated relationship," id. at 9 (emphasis in original), between the U.S. and Puerto Rico. Of course, these statements are simply inaccurate and do not reflect the facts. There is no room for doubt that Public Law 600, 64 Stat. 319 (1950) (codified at 48 U.S.C § 731b, et seq.) (authorizing Puerto Rico to enact a constitution for local self-government), and its sequel, Public Law 447, 66 Stat. 327 (1952) (resolution approving Puerto Rico's Constitution), did nothing to change the underlying constitutional status of Puerto Rico as an unincorporated territory, subordinated to Congress' plenary powers under the Territorial Clause, U.S. Const., Art. IV, § 3, cl. 2. See generally David M.

point in time the inhabitants of Puerto Rico had full rights as Spanish citizens. This included the right to elect sixteen deputies and three senators, with full voting rights, to the Spanish Cortes (Parliament).[22] Fernando Bayrón Toro, Elecciones y partidos de

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Helfeld, The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico, 21 Rev. Jur. U.P.R. 135 (1952); David M. Helfeld, Congressional Intent and Attitude Toward Public Law 600 and The Constitution of the Commonwealth of Puerto Rico 21 Rev. Jur. 255 (1952) (containing numerous citations to the Congressional record and reports indicating that these measures did not change Puerto Rico's basic status under the Constitution nor Congress' powers over this unincorporated territory); Keith Bea, Congressional Research Service, Political Status of Puerto Rico: Background, Options, and Issues in the 109th Congress, at CRS-2 (updated Jun. 6, 2005) ("While the approval of the commonwealth constitution marked a historic change in the civil government for the islands, neither it, nor the public laws approved by Congress in 1950 and 1952, revoked statutory provisions concerning the legal relationship of Puerto Rico to the United States. This relationship is based on the Territorial Clause of the U.S. Constitution."). It is not just the majority's inaccuracies in describing the colonial relationship between Puerto Rico and the United States to which I object. The majority's unfortunate choice of language obviously favors the colonial condition and this bias will, without any question or doubt, be exploited politically.

The debate over what status Puerto Rico ought to have with respect to the United States is, of course, hotly contested. What that status should be is not the issue before us. The only issue is whether the U.S. citizens in Puerto Rico should have the right to vote nationally. The right to vote will benefit all U.S. citizens residing in Puerto Rico regardless of their position on status, since it will give them a meaningful political voice until that issue is resolved, and on that issue itself.

[22]In fact, Puerto Rico had been represented in the Spanish Cortes as early as 1812, see Constitución política de la Monarquía Española (promulgated in Cadiz on Mar. 18, 1812), as a result of

Puerto Rico 108 (2003). Furthermore, Puerto Ricans had recently been granted a high measure of self-government. See generally Autonomic Charter of 1897, reproduced at, Documents on the Constitutional Relationship of Puerto Rico and the United States 22-46 (Marcos Ramirez Lavandero, ed., 1948).

All this came to naught with the signing of the Treaty of Paris on December 10, 1898, which officially concluded this "splendid little war"[23] and ended four hundred years of Spanish colonial rule. See Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754. Thus commenced, in its place, a new period of colonialism which has so far lasted one hundred and seven years.[24] Notwithstanding Puerto Ricans' loss of these major political grants from Spain, the transition to United States sovereignty was largely seamless.[25] This was at least partially due to the fact that Spanish

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which its one deputy, Ramón Powers, became Vice President of the Cortes in 1812. Thereafter, depending on the vagaries of Spanish politics, constitutions, and special laws enacted to apply to Spain's overseas provinces and colonies, Puerto Rico was variously represented in the Cortes.

[23] John Hay, U.S. Ambassador to Great Britain in 1898, and a leading expansionist of the time, wrote to then Colonel Theodore Roosevelt, at the time of only Rough Rider fame, "[i]t has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favored by that fortune which loves the brave." Frank Freidel, The Splendid Little War 3 (1958); Hugh Thomas, Cuba, The Pursuit of Freedom 404 (1971).

[24] See generally José Trías Monge, Puerto Rico: The Trials of the Oldest Colony in the World (1997).

[25] U.S. troops were received in Ponce, Puerto Rico's second largest city, by the municipal band playing the "Star Spangled Banner," and General Nelson Miles, commanding general of the expeditionary force wired Washington: "Please send any national colors that can be spared, to be given to the

rule had been less than kind,[26] but more importantly, because of the prospect of joining a democratic nation that promised the Puerto Rican people that it had come to "bestow upon [Puerto Ricans] the immunities and blessings of [the] liberal institutions of our government." Letter of Nelson Miles, Major-General Commanding the U.S. Army to the Inhabitants of Porto Rico (Nov. 5, 1898) in Annual Reports of the War Department for the Fiscal Year Ended June 30, 1900 19-20 (1902). See generally Bailey W. Diffie & Justine Whitfield Diffie, Porto Rico: A Broken Pledge (1931).

In fact, the Treaty of Paris left to future action by Congress what should be "[t]he civil rights and political status of the native inhabitants of the territories . . . ceded to the United States". Treaty of Peace, art. IX, para. 2, 30 Stat. 1754, 1759. Thus, for the first time in American history, the United States acquired territory without ipso facto granting its inhabitants citizenship,[27] and

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different municipalities." 1 Messages and Documents, 1898-1899.

[26] See Antonio Salvador Pedreira, El Año Terrible del 87: Sus Antecedentes y Sus Consecuencias, Ed. Edil, Rio Piedras (1974).

[27] See Treaty Between the United States of America and the French Republic, April 30, 1803, U.S.-Fr. art. III, 8 Stat. 200, 202 (Louisiana Purchase); Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Feb. 22, 1819, U.S.-Spain, art. 6, 8 Stat. 252 (acquisition of Florida); Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922 (acquisition of California); Gadsen Treaty, Dec. 30, 1853, U.S.-Mex., art. V, 10 Stat. 1031 (acquisition of Arizona); Treaty concerning the Cession of Alaska, Mar. 30, 1867, U.S.-Russ., art III, 15 Stat. 539 (acquisition of Alaska); Act of Apr. 30, 1900, ch. 1, § [illegible] cl. 339, 31 Stat. 141 (providing a government for Hawaii). Hawaii was actually annexed in 1898, see Joint Resolution To provide for annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898), two years before citizenship was granted.

therefore, also contrary to its founding history, the United States became a colonial nation. See Julius William Pratt, America's Colonial Experiment 68 (1950). Immediately after the invasion, Puerto Rico settled into a military government that lasted until 1900, when Congress enacted the so-called Foraker Act. Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.). This statute established a civil government composed almost totally of officials appointed by the President. A local legislature was provided, but only its lower house was elected by Puerto Rican residents. The Foraker Act declared these residents to be "citizens of Porto Rico."[28] Foraker Act § 7 ("[A]ll inhabitants continuing to reside [in Puerto Rico] who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States . . . .") As such, they became "nationals" of the United States.[29] Almost immediately after the Foraker Act went into

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[28]Between 1900 and 1932, Puerto Rico was officially misspelled as "Porto Rico," as a result of the incorrect spelling of the Island's name in the English version of the Treaty of Paris in 1898. This incorrect spelling was thereafter used in the Foraker Act in 1900, after which it took thirty-two years to persuade Congress that "Porto" is Portuguese and that the correct Spanish name should be restored. This was finally done by joint resolution on May 17, 1932. Joint Resolution to change the name of "Porto Rico" to "Puerto Rico," ch. 190, 47 Stat. 158 (1932).

[29] A national, as distinguished from a citizen, who is "a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections," Black's Law Dictionary 261 (8th ed. 2004), is a person who owes allegiance to a state but does not enjoy the full rights of a citizen. See José A. Cabranes, Citizenship and the American Empire, 127 U. Pa. L. Rev. 391 (1978); see also Gonzalez v. Williams, 192 U.S. 1, 12-13 (1904); cf. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1857) (holding that "a negro of African descent, [whose] ancestors were of pure African blood,

effect, a challenge was made to its provisions allowing the imposition of duties on goods imported into Puerto Rico from the United States. It was claimed that this tax was contrary to the Uniformity Clause of Article I, Section 8 of the Constitution. U.S. Const., art. I, § 8, cl. 1 ("all Duties Imposts, and Excises shall be uniform throughout the United States").

In the course of ruling upon this issue, the Supreme Court, in 1901, decided the Insular Cases,[30] wherein it sanctioned Puerto Rico's colonial status ad perpetuam. There is no question that the Insular Cases are on par with the Court's infamous decision in Plessy v. Ferguson in licencing the downgrading of the rights of discrete minorities within the political hegemony of the United States. See Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that it was not a violation of the Equal Protection Clause for a state law to segregate white and colored people in public facilities provided "equal" alternatives were provided for each race); see also Rubin Francis Weston, Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1893-1946 15 (1972) ("Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern "counterrevolutionary" point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period an the relation

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and were brought into this country and sold as slaves," id. at 397, was not entitled to the privileges and immunities of the Constitution accorded to citizens).

[30] De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901). See generally Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985).

of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.")

The Insular Cases, would today be labeled blatant "judicial activism."[31] See, e.g., Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism", Comment, 92 Cal. L. Rev. 1441, 1463-76 (2004) (describing judicial practices purported to be indicative of judicial activism). They are anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda.[32] These theories

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[31] As Finely Peter Dunne, a popular political wit of the time said about the Insular Cases, "[n]o matter whether th' constitution follows th' flag or not, th' supreme court follows th' ilection results." Finley Peter Dunne, Mr. Dooley's Opinions 26 (1901). Whether the Constitution applied in the territories acquired as a result of the Spanish-American War was, of course, central to the Insular Cases, and a major issue in the 1900 elections, which were won by McKinley and those who favored overseas territorial expansion without extension of the Constitution. See La Feber, "The Elections of 1900," in 3 History of American Presidential Elections, 1789-1968 1877 (Arthur M. Schlesinger, Jr. ed., 1971).

[32] See, e.g., Selden Bacon, Territory and the Constitution, 10 Yale L.J. 99 (1901); William W. Howe, The Law of Our New Possessions, 9 Yale L.J. 379 (1900); Charles C. Langdell, The Status of Our New Territories, 12 Harv. L. Rev. 365 (1899); Carman F. Randolph, Constitutional Aspects of Annexation, 12 Harv. L. Rev. 291 (1898); James Bradley Thayer, Our New Possessions, 12 Harv. L. Rev. 464, 467 (1899) ("Let me at once and shortly say that, in my judgment, there is no lack of power in our nation -- of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them . . . ."); cf. Simeon E. Baldwin, The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory, 12 Harv. L. Rev. 393 (1899). See generally Frederic R. Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Colum. L. Rev. 823 (1926).

in turn provided a platform that allowed a receptive bare plurality of Justices[33] to reach a result unprecedented in American jurisprudence and unsupported by the text of the Constitution. See generally James E. Kerr, The Insular Cases: The Role of the Judiciary in American Expansionism (1982).

In fact, what precedent existed was contrary to the premise underlying the Insular Cases, for in Dred Scott, Chief Justice Taney had concluded:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure . . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.

Dred Scott v. Sanford, 60 U.S. (19 How.) at 446.

This conclusion, however, presented no obstacle to Justice Brown, who wrote the opinion of the Court in Downes v. Bidwell, the leading Insular Case:

> We are also of opinion that the power to acquire territories by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire."

Downes, 182 U.S. at 279.

Justice Brown goes on to say, in language that is tinged by Plessy-like views:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of

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[33] In Downes, 182 U.S. 244, Justice Brown delivered the judgment of the court. Justice White delivered a concurring opinion joined by Justices Shirra and McKenna. Justice Gray also delivered a concurring opinion. Chief Justice Fuller dissented, with Justices Harlan, Brewer and Peckham joining. Justice Harlan also filed a separate dissent.

> the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

Id. at 282. He concluded that:

> A false step at this time might be fatal to what Chief Justice Marshall called the American Empire . . . . If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out . . . . We decline to hold that there is anything in the Constitution to forbid such action. We are therefore of the opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . .

Id. at 286-87.

Justice White's concurrence in Downes provided the central support for the seminal "unincorporated territory" doctrine for which the Insular Cases have become known. This doctrine states that in the case of unincorporated territories -- that is, those for which, at the time of acquisition, the United States did not express an intention of incorporating into the Union -- only those parts of the Constitution dealing with "fundamental" rights apply. See Coudert, supra, note 32, at 832 (relating a conversation with Justice White in which it was "evident that he was much preoccupied by the danger of racial and social questions of a very perplexing character and that he was quite as desirous as Justice Brown that Congress should have a very free hand in dealing with the new subject populations").

Chief Justice Fuller's dissent, which was joined by Justices Harlan, Brewer and Peckham, and thus gathered the most votes,

followed a strict construction of the Constitution. It rejected the plurality's conclusion as inconsistent with the Constitution, because it

> assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.

Downes, 182 U.S. at 373 (Fuller, C.J., dissenting).

Justice Harlan's dissent was equally forceful in pointing out that:

> Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories . . . . Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution . . . . The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,--the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,-- is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.

Id. at 380. Justice Harlan went on to say, in part to answer the racial overtones of the plurality, that:

> Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought

> within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued . . . . The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the government was ordained.

Id. at 384-85.

Although decided by an exiguous plurality of five votes to four, and based on dubious constitutional foundations, the Insular Cases became an article of faith in American constitutional dogma, with far-reaching consequences on the lives of the millions of persons whom they impacted in very fundamental ways. See Torruella, supra note 30, at 117-266.

B. United States citizenship for the residents of Puerto Rico

In the aftermath of the Insular Cases, the United States settled into the business of governing its far-flung colonial empire and emerged from its isolationist cocoon into the world of power politics. See generally Foster Dulles, America's Rise to World Power, 1898-1954 (1955). In the meantime, between 1901 and 1917, a total of twenty one bills were presented in Congress proposing the grant of U.S. citizenship to Puerto Rico's inhabitants.[34] During this interregnum between the Insular Cases

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[34] For a full account see Cabranes, supra note 29.

and the 1917 passage of the Jones Act, ch. 145, 39 Stat. 951 (1917) -- which granted U.S. citizenship to the residents of Puerto Rico, id. § 5 -- the Supreme Court decided Rassmussen v. United States, 197 U.S. 516 (1905). Rassmussen provides an important backdrop to the grant of citizenship to Puerto Ricans because in it, the Supreme Court seemed to link the incorporation of a territory into the United States (and thus full application of the Constitution) to the granting of citizenship to the inhabitants of a territory. See id. at 522 (finding grant of citizenship to residents of newly acquired territory of Alaska served "to express the purpose to incorporate acquired territory into the United States.").

There was therefore great expectation in Puerto Rico when Congress passed the Jones Act in 1917, which, in addition to providing Puerto Ricans with an elected bicameral legislature, granted U.S. citizenship to the residents of Puerto Rico.[35] These hopes were soon deflated by the Supreme Court in Balzac v. Porto Rico, 258 U.S. 298 (1922), in which Chief Justice William Howard Taft,[36] at this point writing for a unanimous court, held

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[35] For an in-depth account of the events leading up to the passage of the Jones Act, particularly the acrimonious debates that preceded its passage, see Cabranes, supra note 29, at 471-85.

[36] Chief Justice Taft who, of course, had been President of the United States from 1909 to 1912, had a long and somewhat fractious experience with the United States' newly acquired colonies. He did not need to be influenced by academics on questions of expansionism or how to deal with the colonies. In 1900, he became the first civilian governor of the Philippine Islands at a time when the Aguinaldo Insurrection -- a war that led to thousands of U.S. casualties and over 100,000 civilian deaths, many more than in the entire Spanish-American War -- was in full swing. See generally Brian McAllister Linn, The Philippine War, 1899-1902 (2000). In 1904, while Secretary of War under President Theodore Roosevelt, Taft oversaw not only the Philippines, but also Cuba and Puerto Rico. In 1906, he was sent to Cuba as its provisional governor under the Platt Amendment to the Cuban Constitution, which allowed the United States to intervene in Cuban affairs during times of "unrest." However, it

that no right to trial by jury attached to Balzac's new status as a U.S. citizen because, even after the Jones Act, Puerto Rico remained an unincorporated territory with only "fundamental rights" under the Constitution applying. The right to trial by jury was not, the Court reaffirmed, "a fundamental right." Id. at 309-10 (quoting Dorr v. United States, 195 U.S. 138, 148 (1904). Contra Duncan v. Louisiana, 391 U.S. 145, 154 (1968) (holding that trial by jury is a fundamental right).

What rights did U.S. citizenship give Puerto Ricans? "It enabled them to move into the continental United States," and upon becoming residents thereof, to enjoy the rights of other citizens. Balzac, 258 U.S. at 308. It was locality that counted, said Chief Justice Taft, "not the status of the people who live in it." Id. at 309. In language reminiscent of the racially-tinged asseverations of Justice Brown in Downes, Chief Justice Taft went on to say:

> The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire . . . . Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to

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was during his time as President that Taft became openly disenchanted with Puerto Rico and its inhabitants as a result of the so-called Budget Crisis of 1909. See Truman R. Clark, President Taft and the Puerto Rican Appropriations Crisis of 1909, 26 The Americas 152-70 (1969). President Taft accused Puerto Rico's elected leaders of irresponsibility and political immaturity, and suggested that too much power had been given to Puerto Ricans "for their own good." Message from President Taft to Congress, S. Rep. No. 61-10, at 5. See generally Henry F. Pringle, The Life and Times of William Howard Taft (1939).

> determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.

Id., at 310.

Rassmussen was distinguished:

> It is true that in the absence of other and countervailing evidence, a law of Congress . . . declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds [for the holding in Rasmussen] . . . . But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . . .

Id. at 309 (internal citation omitted).

This is a prime example of the double standard that has been used by the Court, and concomitantly by Congress, in determining the rights to which the U.S. citizens of Puerto Rico are entitled. Unfortunately, it is one which has been repeated since Balzac was decided. See Califano v. Gautier Torres, 435 U.S. 1 (1978) (upholding Social Security Act provisions denying benefits to U.S. citizens who move to Puerto Rico); Harris v. Rosario, 446 U.S. 651 (1980) (upholding statute providing less federal financial assistance to Puerto Rico than other states to aid families with dependent children).

The Court's rulings in Kinsella v. Krueger, 351 U.S. 470 (1956), reh'd granted 352 U.S. 901 (1956), and Reid v. Covert, 351 U.S. 487 (1956), reh'd granted, 352 U.S. 901 (1956), illustrate this point even more clearly. Although, in denying Puerto Ricans the right to trial by jury in Balzac, Chief Justice Taft unequivocally stated that "[i]t is locality that is determinative of the application of the Constitution in such matters as judicial procedure, and not the status of the people who live in it," 258 U.S. at 309, the Supreme

Court nevertheless chose to overlook this rule when deciding Kinsella and Reid in the aftermath of the Second World War.

Both cases involved challenges to the application of the Uniform Code of Military Justice to women who were tried, convicted and sentenced by court martial for murdering their serviceman husbands, one in Japan (Kinsella), and the other in England (Reid). Neither had the benefit of indictment by grand jury or trial before a petit jury. On the first round, the Court, relying on Balzac, affirmed the validity of both convictions. Kinsella, 351 U.S. at 474-80; Reid, 351 U.S. at 490-91 (relying on Kinsella as establishing validity of military jurisdiction).

This outcome was followed by much public stirring, an unsurprising result, considering the number of civilian U.S. citizens who were then attached to the military overseas. The public outcry undoubtedly contributed to their being reheard almost immediately, early in the Court's next term.

The plurality opinion, reversing the prior outcome, was written by Justice Black. He announced that the reliance placed on the Insular Cases in the first Kinsella opinion was "misplaced." Reid v. Covert, 354 U.S. 1, 13 (1957). In language reminiscent of Justice Harlan's dissents in the Insular Cases, Justice Black stated:

> The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship . . . . The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

Id. at 14 (emphasis added).

The new outcome in Kinsella and Reid, as well as the reversal of Plessy by Brown v. Board of Education, 347 U.S. 483 (1954), accentuate the realpolitik of the civil and political rights of

the United States citizens who reside in Puerto Rico, for it is because of the democratic deficit in the Puerto Rico-United States relationship that Puerto Rico enters its second century of its colonial condition with the United States without any resolution of this conundrum in sight.[37] Stagnation is inevitable, for there is a political vacuum in the Puerto Rico-United States linkage. No effective political pressure can be exercised by the subjects of this colonial relationship on the national political institutions with power to solve the problem. It is precisely because this discrete population of United States citizens is kept in a voteless state by the national political institutions that have "plenary powers" over Puerto Rico that a "political solution" is not a realistic option. The opinion of U.S. voters affected by Kinsella and Reid could be heard and felt in Washington, as could that of African-Americans after Plessy, even if they were a numerical minority, because they had a significant political presence that was bound to be listened to sooner or later. There can be little doubt that this political clout was transformed into a judicial result. Cf. supra note 31. Not so with Puerto Rico's U.S. citizens. They have no effective way of influencing the political branches of the national government. Puerto Rico's lone non-voting representative in Congress is a prime example of Puerto Rico's political defenselessness. The political pressure that can be exercised by those who took Chief Justice Taft's advice, and moved to the Mainland, is so diluted in the general population of the United States as to make any political pressure by them exiguous.

This total lack of political power is a fact that is glossed over by the majority when it righteously dictates that Puerto Ricans' "right to vote in presidential elections is fundamentally a political [issue] and must be [achieved] through political means." Maj. op. at 13. To what "political means" is the majority

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[37]The debate over what status Puerto Rico ought to have with respect to the United States is, of course, hotly contested. The right to vote will benefit all U.S. citizens residing in Puerto Rico, regardless of their position on status since it will give them a meaningful political voice until that issue is resolved.

referring? Political means are precisely what the U.S. citizens of Puerto Rico lack, and cannot create out of thin air as if by alchemy.

Not only do the national political branches lack incentive to act, but, as illustrated by the majority's views,[38] this disincentive has also been manifested in the Third Branch, which, if the truth be told, laid the groundwork for this state of affairs with its decisions in the Insular Cases and Balzac, and continues to perpetuate the inherent inequalities thus created.

The Supreme Court therefore has every reason to reconsider the Insular Cases and Balzac. They are the product of an era which is a blot on our national and judicial history. The basis upon which they were premised -- that the United States could hold territories and their inhabitants in a colonial status ad infinitum -- was unprecedented and unauthorized by the Constitution. The interpretation given by the Insular Cases and Balzac to the Constitution permits the perpetuation, without limitation, of a class

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[38]Although I place Judge Lipez's concurrence in a separate category, I disagree with his conclusion that we lack jurisdiction to declare the Congress has failed to take any action to comply with its international obligations. This failure affects the "rights and legal relations of an interested party," the U.S. citizens in question, "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). There is nothing hypothetical about plaintiffs' national disenfranchisement. We have the authority to acknowledge that condition, and Congress' failure to take any action to correct it despite having committed, under binding international law, to do so. Judge Lipez misstates the issues as framed by my dissent when he focuses on Congress' failure "to either admit[] Puerto Rico as a state or propose[] . . . [a constitutional] amendment." Supra at 21 (Lipez, J., concurring). Although those are among the remedial options available, it makes no difference whether it be these or other alternatives that Congress adopts. The only unavailable option is to do nothing, because that is a violation of an international pledge which has become United States law. Failure to act has legal consequences that create a case and controversy legally cognizable by a declaratory judgment even if relief is not available.

of citizens unequal in rights to the rest of the body politic, an anachronism that is unsupportable morally, logically or legally.

Furthermore, the underpinnings to this doctrine have since been eroded. If there ever were a justification for their outcome based on the expediency of the historical epoch during which they were decided, this justification can no longer be sustained. Since the Insular Cases and Balzac were decided, Plessy has been reversed by Brown, making racial discrimination legally and ethically unacceptable. Discrimination on the basis of locality makes as much sense as such opprobrious conduct based on race. Moreover, the idea, expressed in Balzac, that the right to trial by jury is not a fundamental constitutional right is no longer the law of the land. See Duncan, 391 U.S. at 154. Balzac's ruling has therefore ceased to be the law of the land.

Puerto Rico is part of the First Circuit. An Article III District Court sits there, providing nearly one-third of the appeals filed before this court, which sits in Puerto Rico at least twice a year, also in the exercise of Article III power. One active judge of this court resides in Puerto Rico and participates in cases that are often of national importance, but is nonetheless disenfranchised from voting for national offices. How can the Constitution be applied in such a Balkanized, arbitrary and irrational manner? See Downes, 182 U.S. at 374 (Fuller, C.J., dissenting) ("[T]he language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced.").

The proposition that Puerto Rico "belong[s] to . . . but [is] not a part of the United States," Downes, 181 U.S. at 287, like the "separate but equal" concept endorsed in Plessy, belongs to the Dark Ages of American constitutional law and should be relegated to a period in our history best forgotten.

II.

A. The right to vote is a fundamental constitutional right

The right to vote is a fundamental right, which our Constitution guarantees to all citizens. See, e.g., Bush v. Gore, 531 U.S. 98, 104 (2000); Burson v. Freeman, 504 U.S. 191, 198 (1992); Tashjian v. Republican Party, 479 U.S. 208 (1986); Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976); Lubin v. Panish, 415 U.S. 709, 721 (1974); Bullock v. Carter, 405 U.S. 134 (1972);

Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 561-562 (1964); Wesberry v. Sanders, 376 U.S. 1, 7 (1964).

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry, 376 U.S. at 17-18. "[H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964) (footnote omitted).

Fundamental voting rights protections should apply fully to U.S. citizens residing in Puerto Rico. Even under the notorious Insular Cases, it has been held that the Constitution extends fundamental rights to Puerto Rico. See Balzac, 258 U.S. at 312-13. The Fifth Amendment is fully applicable to the actions of the U.S. government in Puerto Rico. Cf. Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572 (1976). Although not identical to that of the Fourteenth Amendment, an equal protection component is part of the due process clause of the Fifth Amendment, and serves to constrain the United States. See Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) (holding that despite lack of explicit equal protection clause, "discrimination may be so unjustifiable as to be violative of due process"). The utter failure of the government of the United States to take any action to protect its citizens in Puerto Rico from continued national disenfranchisement is a violation of due process and equal protection under the Fifth Amendment of the Constitution.

B. International Law

In addition to the right to vote enshrined in its Constitution, the United States is also bound, both domestically

and internationally, by guarantees of voting rights found in international law. Historically referred to as "the law of nations," international law incorporates both treaty law and customary international law. Restatement (Third) of Foreign Relations Law of the United States § 102 (2004) ("Restatement"). Thus conceived, international law has been an integral part of our constitutional and legal system since the founding of our Nation. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is part of the law of the land."). The importance placed on international law, from the founding of the United States, as a component of the nation's legal system is evident in its Constitution, which authorized Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, granted the President the power, "by and with the Advice and Consent of the Senate, to make Treaties," id. art. II, § 2, cl. 2, and extended the Article III authority of the federal judiciary to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,[39] and Treaties made, or which shall be made," id. art. III, § 2, cl. 1. It also provided that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be

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[39]Customary international law is part of the "Law[] of the United States" within the meaning of Article III. See, e.g., Sosa, 124 S.Ct. at 2764 ("[T]he domestic law of the United States recognizes the law of nations."); see also Restatement § 111, cmt. e; Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1566 (1982).

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id. art. VI, cl. 2. In light of the historical significance of international law, the Supreme Court has recently recognized that "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." Sosa, 124 S.Ct. at 2764-65.

We look to the treaties and conventions to which the United States is a party, both to determine whether they impose a direct obligation on the United States that is relevant to plaintiffs-appellants' claims, and, in combination with widely-observed legal norms and practices among the nations of the world today, as evidence of binding customary international law that would support plaintiffs-appellants' claims. See Restatement § 102 (identifying sources of customary international law); see also id. § 103 (identifying secondary evidence of international law).

The United States has participated in several international instruments relevant to the issue before us: (1) the Universal Declaration of Human Rights ("UDHR") G.A. Res. 217 A (III), U.N. Doc. A/810 (1948); (2) the American Declaration of the Rights and Duties of Man ("American Declaration"), O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) (3) the Inter-American Democratic Charter of the Organization of American States ("IADC"), 28th Spec. Sess., OAS Doc. OEA/Ser. P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), and (4) the International Covenant on Civil and Political Rights ("ICCPR"), opened for signature Dec 16, 1966, 999 U.N.T.S. 171.[40]

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[40] In addition, the American Convention of Human Rights("ACHR"), adopted in 1969 and signed by twenty-six countries (not including the United States) between 1969 and 2000, provides in Article 23(1) that "every citizen shall enjoy . . . rights and opportunities: . . . to vote . . . in genuine periodic elections, which shall be by universal and equal suffrage . . . ." ACHR, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force Jul. 18, 1978).

In 1948, the member states of the General Assembly of the United Nations, including the United States, proclaimed the UDHR, which states:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
> . . . [and that]
> 3. The will of the people shall be . . . expressed in periodic and genuine elections which shall be by universal and equal suffrage . . . .

UDHR art. 21.

Although the Supreme Court has ruled that "the [UDHR] does not of its own force impose obligations as a matter of international law," Sosa, 124 S. Ct. at 2767, it has nevertheless recognized its "moral authority," id., and has cited to its provisions on several occasions. See Knight v. Florida, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting) (noting U.N. Human Rights Committee decisions that a ten-year delay between death sentence and execution is not necessarily a violation of UDHR as informative precedent in Eighth Amendment case); Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (citing UDHR Article 25 as informative "[o]n the issue of whether there is a 'right' to welfare assistance"); Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1965) (citing UDHR Article 13 in discussion of scope of due process); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963) (noting, in rejecting revocation of U.S. citizenship as consequence of remaining abroad to evade military service, the UDHR's guarantee "of the right of every citizen to retain a nationality"); Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring) (citing UDHR provisions on freedom from mandatory association in context of discussing foreign standards of labor law).

Beyond the UDHR, Article XX of the American Declaration, agreed to in 1948 by all of the member States of the Organization of American States, including the United States, provides that: "[e]very person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections . . . ."

In 2001, the United States joined thirty-four other countries in this hemisphere in adopting the IADC. Coincidentally, this occurred at a Special General Assembly of the Organization of the American States meeting in Lima, Peru on the fateful day of September 11, 2001. The importance of this agreement to the United States can be gauged by what took place there and by the actions of Secretary of State Collin Powell, who headed the U.S. delegation at that meeting. After thanking the gathered delegates for their expressions of solidarity and condolences for the terrorist attacks that had occurred that day against the United States homeland, the Secretary stated:

> It is important that I remain here for a bit longer in order to be part of the consensus of this new charter on democracy. That is the most important thing that I can do before departing to go back to Washington, D.C. and attend the important business that awaits me and my other colleagues . . . . I hope we can move the order of business to the adoption of the Charter because I very much want to express the United States' commitment to democracy in this hemisphere . . . . And we unite behind it as democratic nations committed to individual liberties . . . .

Secretary Colin Powell, Statement at the Special General Assembly of the Organization of American States (Sep. 11, 2001), available at http://www.state.gov/secretary/rm/2001/5656.htm. Thereafter, the Special Assembly adopted the IADC, which among other relevant provisions states:

> Article 2
> The effective exercise of representative democracy is the basis for the rule of law and constitutional regimes of the member states
>
> . . . .
>
> Article 3
> Essential elements of representative democracy include, inter alia . . . the holding of periodic, and fair elections based on secret balloting and

> universal suffrage as an expression of the sovereignty of the people
>
> . . . .
>
> Article 6
> It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy
>
> . . . .

Prior to the approval of the IADC, however, the United States had already entered into another international agreement whose provisions are of singular importance to the issue before us. By virtue of the ICCPR, which came into force on March 23, 1976, and was ratified by the Senate on April 12, 1992, see 138 Cong. Rec. S4781, S4783, the United States committed, in clear and unambiguous terms, that "[e]very citizen shall have the right and the opportunity . . . [t]o vote . . . at genuine periodic elections which shall be by universal and equal suffrage . . . ." ICCPR art. 25. Furthermore, in ratifying Article 2, Paragraph 1, the United States agreed that it would "undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . without distinction of any kind . . . ." Most important, and central to the issue before us, the signatory nations committed themselves that:

> [W]here not already provided for by existing legislati[on] . . . each State Party . . . undertakes to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislation or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Id. art. 2, para. 2 (emphasis added).[41]

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[41]The United States further agreed to an enforcement mechanism for the realization and security of the rights established in the ICCPR. Each State Party undertook "[t]o ensure that any person whose [ICCPR] rights or freedoms . . .'are violated shall have an effective remedy," to ensure that these rights would be "determined by competent judicial, administrative or legislative

We turn now to an examination of the United States' obligations under these international instruments and the customary international law to which they contribute.

1. Treaty obligations

By 1992, 103 nations had become parties to the ICCPR, with another five, including the United States, having signed. On April, 12, 1992, as required by the Constitution, two-thirds of the United States Senate voted in favor of ratifying the ICCPR. 138 Cong. Rec. S4781, S4783. Under Article VI, Clause 2 of the Constitution, a treaty thus ratified has equal status to an act of Congress. That is, a treaty is law of the United States. See, e.g., Jordan J. Paust, International Law as Law of the United States 99-105, 120 (2d ed. 2002). As with statutes, a later treaty supercedes inconsistent earlier-enacted statute, provided the treaty provision on the subject is self-executing. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

When it ratified the ICCPR, however, the Senate also issued a declaration to the effect that the substantive provisions of the ICCPR would not be self-executing.[42] 138 Cong. Rec. at

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authorities, or by any competent authority provided for by the legal system of the State," and that "the possibilities of judicial remedy" would be developed. Id. art. 2, para. 3 (emphasis added).

[42] The Senate also made actual reservations under which its obligations to comply with various provisions of the ICCPR were limited. See 138 Cong. Rec. S4781, S4783 (stating, inter alia, that the United States will not take any steps to comply with ICCPR Article 20 that would infringe on the right of free speech and association; reiterating the applicability of capital punishment for adults and minors; deeming ICCPR Article 7 prohibitions on "cruel, inhuman or degrading treatment or punishment" to apply only to treatment deemed "cruel and unusual" under domestic constitutional law; declining to adhere to ICCPR Article 15, Paragraph 1; and reserving the right to treat juveniles, under certain circumstances, as adults, notwithstanding the provisions of ICCPR Article 10, Paragraphs 2(b) and 3, and Article 14, Paragraph 4).

S4784. wholeheartedly agree with Judge Howard's conclusion that this declaration is not binding on this court, and that further inquiry to determine whether the ICCPR is indeed non-self-executing is required. See infra at 89 (Howard, J., dissenting). I will not attempt to restate his sound reasoning here. However, even if this approach is not accepted, this court is not, as explained below, entirely without power to act.

If the ICCPR were not self-executing, the treaty, qua treaty, could not be invoked by a private citizen as the basis for a court of the United States to order that citizen's full participation in the electoral processes of the United States. See Sosa, 124 S. Ct. at 2767 (recognizing the internationally-binding nature of the ICCPR, but observing that "the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal

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In contrast, no reservations or other limitations to the specific obligations contained in Article 25 were made, aside from the declaration of non-self-execution applicable to all substantive articles of the ICCPR. Id. This is indicative of the Senate's intent to accept the obligation of full compliance with that provision of the ICCPR. See also id. at S4784 (adding the Understanding "[t]hat the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments," and that "the Federal Government shall take measures appropriate to the Federal system" to ensure that "state or local governments may take appropriate measures for the fulfillment of the Covenant" for matters under their jurisdiction) (emphasis added); Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998) ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under international human rights treaties to which it is a party, including the ICCPR . . . .").

courts").[43] That is, a court of the United States could not use the requirement, established in Article 25 of the ICCPR, that "[e]very citizen shall have the right and opportunity . . . to vote," as the basis for enforcing an individual's right to participate in the electoral processes of the United States, until such time as there has been municipal implementation of Article 25 by the enactment of intra-national legislation or constitutional provision. Neither could the courts of the United States order that the legislative branch of government live up to the obligations undertaken by the United States to "adopt such legislation or other measures as may be necessary to give effect to [the right to vote established in Article 25 of the ICCPR]." ICCPR art. 2, para. 2. Such an intromission would violate the constitutional principle of separation of powers. See Smith & Lee Assocs., Inc. v. City of Taylor, Mich., 102 F.3d 781, 797 (6th Cir. 1996) ("Federal Courts do have jurisdiction and power to pass upon the constitutionality of Acts of Congress, but we are not aware of any decision extending this power in Federal Courts to order Congress to enact legislation. To do so would constitute encroachment upon the functions of a legislative body and would violate the time-honored principle of separation of powers of the three great departments of our Government."). The majority's contentions regarding the trumping of treaty provisions by the Constitution, maj. op. at 7, are thus inapposite, as I recognize the validity of this hierarchy and am not in any way proposing its violation.

That said, however, it is an undisputed fact that, contrary to the requirements of Article 2, Paragraph 2 of the ICCPR, the United States has taken no steps, to date, to implement the obligations undertaken therein. More directly on point, the United States has not enacted any legislation, passed any constitutional provision, or even put in motion any process directed at nationally enfranchising the nearly four million United States citizens residing in Puerto Rico, notwithstanding its ratification of the

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[43] As Judge Howard notes, this statement from Sosa is not at odds with the conclusion that the non-self-execution declaration is not, itself, binding on the courts. See infra at 105, n.63 (Howard, J., dissenting).

ICCPR and the Senate's acknowledgment "[t]hat the United States understands that this Covenant shall be implemented by the Federal Government." 138 Cong. Rec. S4781, S4784 (emphasis added). Accordingly, the United States is not in compliance with the binding obligations it undertook by signing and ratifying the ICCPR. The majority does not and cannot refute this undeniable fact, and, as explained below, the potentially non-self-executing nature of the ICCPR does not preclude our ability to make a declaration to that effect, see infra Part III.C.

2. Customary international law

Customary international law constitutes "those clear and unambiguous rules by which States universally[44] abide, or to which they accede, out of a sense of legal obligation and mutual concern . . . ." Flores v. S. Peru Copper Corp., 406 F.3d 65, 84 (2d Cir. 2003). The norm in question must be "specific, universal and obligatory," In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994), and must be a matter of "mutual, and not merely several concern . . . ." Flores, 406 F.3d at 81 (quoting Filartiga v. Peña-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).

Although the test is demanding, the content of customary international law is not fixed and immutable. See Sosa, 124 S. Ct. at 2761-62 ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."); Filartiga, 630 F.2d at 881 ("[I]t is clear that courts must interpret international law not as it was in

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[44]The universality requirement does not imply that compliance with customary international law norms be perfect. "States need not be universally successful in implementing the principle in order for a rule of customary international law to arise. If that were the case, there would be no need for customary international law. But the principle must be more than merely professed or aspirational." Flores, 406 F.3d at 80; see also Restatement § 102, cmt. b.

1789, but as it has evolved and exists among the nations of the world today.") (citing Ware v Hylton, 3 U.S. (3 Dall.) 199 (1796) (distinguishing "ancient" from "modern" law of nations)). We look to international instruments setting forth "clear and unambiguous rules," Flores, 406 F.3d at 84, and to other indications of widespread compliance motivated by a sense of legal obligation, by the nations of the world to establish the content of customary international law. See id. at 82-84; Restatement § 102 (2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

The ICCPR, the UDHR, the American Declaration, the ACHR and the IADC are all evidence of the emergence of a norm of customary international law with an independent and binding juridical status. See Restatement § 102(3) ("International agreements . . . may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."). The right to equal political participation required by these instruments, as outlined above, is clear and unambiguous. The ICCPR, for example, admits of no doubt when it states that "[e]very citizen shall have the right and the opportunity . . . [t]o vote . . . at genuine periodic elections which shall be by universal and equal suffrage . . . ." ICCPR art. 25. The universal acceptance of this right to equal political participation is demonstrated by the prevalence of the right in a variety of multinational and regional agreements, and by the broad acceptance of those agreements by the countries of the world. Currently, for example, 163 nations of the 191-member United Nations are parties to the ICCPR, with an additional seven signatories that have not yet ratified the treaty.

The right to equal political participation, as evidenced by these international treaties, covenants, and declarations, is reinforced by what has become the overwhelming practice worldwide. See, e.g., Enrique Lagos & Timothy D. Rudy, In Defense of Democracy, 35 U. Miami Inter-Am. L. Rev. 283, 288-89 (2004) ("Democracy as an international law norm has been 'emerging' for some time, especially in the western hemisphere."); Fernando R. Tesón, "Changing Perceptions of Domestic Jurisdiction and Intervention," in Beyond Sovereignty: Collectively

Defending Democracy in the Americas 35 (Tom Farer ed., 1996) ("[t]here can be little doubt that a principle of democratic rule is today part of international law"). From an exiguous minimum of only twenty-two democratic governments out of 154 sovereign states elected by universal suffrage in competitive multiparty elections in 1950, the number of democratic states to 120 out a total of 192 nations in the year 2000. Freedom House, Democracy's Century: A Survey of Global Political Change in the 20th Century 2 (1999). While the system of democratic government may differ from country to country, the fundamental right of citizens to participate,[45] directly or indirectly, in the process of electing their leaders is at the heart of all democratic governments. See, e.g., James Crawford, "Democracy and the Body of International Law," in Democratic Governance and International Law 93 (Gregory Fox & Brad R. Roth eds., 2000) ("[t]hat the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea").

We cannot overlook, and in fact we should take judicial notice of, the many official actions of the United States in promoting democratic elections throughout the world -- not the least of which is its support for the recently held national elections in Afghanistan and Iraq,[46] places where thousands of U.S. citizens

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[45] See, e.g., Freedom House, List of Electoral Democracies, at www.freedomhouse.org/research/freeworld/2003/tables.htm (2003) (listing 121 countries which have at least four different systems of democracy including parliamentary, federal parliamentary, presidential parliamentary, and federal presidential parliamentary).

[46] See Afghans Studying the Art of Voting, N.Y. Times, Oct. 4, 2004, at A1 (discussing Afghanistan's first ever democratic elections); David E. Sanger & Stephen R. Weisman, The Iraqi Election: The White House; Bush Hails Vote, N.Y. Times, Jan. 31, 2005, at A1 (reporting that President Bush called the election in Iraq a "triumphant moment in his efforts to spur democratic movements throughout [the] Middle East"); Steven R. Weisman,

from Puerto Rico serve, AP State & Local Wire, A Package of News Briefs from the Caribbean, Mar. 19, 2005 (reporting 1800 Puerto Ricans currently stationed in Iraq, Kuwait, Afghanistan and Bosnia), at least twenty-five of whom have lost their lives in support of the rights of the citizens of those countries to vote. Id. The situations in Iraq and Afghanistan present the further anomaly of two classes of U.S. citizens, both fighting and dying side by side, only one of which was able to vote for its Commander in Chief. See Uniformed and Overseas Citizens Absentee Voting Act § 102, 42 U.S.C. § 1973ff-1(a) (requiring states to permit absentee voting by overseas military personnel).

But most important, in what may be the ultimate example of not seeing the forest for the trees, there are few countries in the world in which the right to vote is as exalted as it is in the United States. See Wesberry, 376 U.S. at 17 ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). Furthermore, the right to vote is directly protected by Federal statute, which provides both civil and criminal penalties for interference therewith, see Voting Rights Act § 12, 42 U.S.C. § 1973, by several constitutional amendments, see U.S. Const., amend. XV (prohibiting discrimination in voting rights because of race); id. amend. XIX (prohibiting voting discrimination by reason of gender); id. amend. XXIII (granting the residents of the District of Columbia the right to vote for the President of the United States); id. amend. XXIV (prohibiting poll tax); id. amend. XXVI (extending the right to vote to all citizens over the age of 18); see also, e.g., Proclamation No. 7806, 69 Fed. Reg. 52,987 (Aug. 26, 2004) (concerning women's right to vote); Proclamation No. 7584, 67 Fed. Reg. 55,317 (Aug. 23, 2002) (concerning Afghan women's right to vote); Proclamation No. 6924, 61 Fed. Reg. 51,767 (Oct. 2, 1996) (concerning right to vote for citizens aged between 18 and 21); Der Reichman, Bush Promotes Democracy in Hemisphere of

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U.S. Asks Others to Pressure Iraq to Be Inclusive, N.Y. Times, Jun. 12, 2005, at A1 (reporting that U.S. seeks to "enlist [] Europe, the Arab world and the United Nations to pressure the Bagdad government to include minorities in the political process").

the Americas, San Juan Star, Jun. 5, 2005, at 11 (in a speech before the Organization of American States, President Bush urged that entity to monitor democratic progress in the hemisphere, check the credibility of elections, and offer a vision of hope "founded on representative government").

In light of the proliferation and widespread acceptance of, and compliance with, international instruments that specifically require a right to equal political participation by all citizens, we should conclude that such a right is a norm of customary international law.

At least some components of customary international law are incorporated into United States domestic law as federal common law. See Sosa, 124 S.Ct. at 2764-65 (recognizing a class of international law claims as judicially enforceable federal common law); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995)(terming it a "settled proposition that federal common law incorporates international law"); 13B Charles Alan Wright, et al., Federal Practice & Procedure: Jurisdiction 2d, § 3585, at 329 (2d ed., 1984) ("[T]oday it is not difficult to conclude that customary international law is part of federal common law . . . .").

The Supreme Court in Sosa recognized that certain claims based on customary international law, as a result of their status as federal common law, can be enforced in the federal courts under the Alien Tort Statute, 28 U.S.C. § 1350. See Sosa, 124 S.Ct. 2764-65. Although the Alien Tort Statute grants jurisdiction only over "causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, the Sosa court did not foreclose the possibility of directly enforcing some customary international law claims through the federal common law when federal jurisdiction is based on other grounds. See Sosa, 124 S.Ct. at 2765, n.19 (expressing doubt, but leaving open possibility of common law claims for violation of customary international law when jurisdiction is based on 28 U.S.C. § 1331); cf. id. at 2761 (noting that, at least under Alien Tort Statute, no legal development "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law"). In light of legislative history that indicates Congress's intent to extend federal jurisdiction over cases "arising under" federal law to the fullest extent the Constitution

would allow, see 2 Cong. Rec. 4986-87 (1874) ("The [Judiciary] [A]ct of 1789 did not confer the whole [judicial] power which the Constitution confers . . . This bill does. . . . This bill gives precisely the power which the Constitution confers -- nothing more, nothing less."), we should conclude that the jurisdiction conferred by 28 U.S.C. § 1331 can encompass claims arising under customary international law as incorporated into the federal common law.

The Supreme Court limited recognizable claims, however, to "a narrow class of international norms." Sosa, 124 S. Ct. at 2764. Specifically, "courts should require any claim based on the present-day law of nations to rest on a norm [1] of international character [2] accepted by the civilized world and [3] defined with a specificity comparable to the features of the 18th-century paradigms" that were recognized at that time as actionable violations of the law of nations. Id. at 2761-62. These were violations of international law that "admitt[ed] of a judicial remedy and at the same time threaten[ed] serious consequences in international affairs," such as the 18th-century prohibitions on violation of safe conducts, infringement of the rights of ambassadors, and piracy. Id. at 2756.

As established above, the first two requirements -- international character and broad acceptance -- have been met in the case of the customary international law requirement that citizens be permitted full and equal participation in their government. Furthermore, this norm is defined with a specificity comparable to the international law norms recognized as actionable at the founding of our nation. Its requirements are clear and definite,[47] and the failure to fulfill it can indeed threaten serious consequences in international affairs, as evidenced by the

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[47] Compare the language of the international instruments described above with the extended discussion of the definition of "piracy" in United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-63 (1820) and the comment in the dissent that the reason such lengthy discussion and definition was the "uncertainty which it was known existed on the subject in the law of nations . . ." Id. at 170-71 (Livingston, J., dissenting).

pressure exerted by the United States and other governments on non-democratic regimes abroad. Cf. Case 11.204, Inter-Am. C.H.R. 727, OEA/ser.L/V/II.118, doc. 5 rev. 2 (2003) (finding by Inter-American Commission of Human Rights that the United States "is responsible for violations of Petitioners' rights under Articles II and XX of the American Declaration by denying [citizens of the District of Columbia] an effective opportunity to participate in their federal legislature").

Because the right to equal political participation by all citizens meets all of the elements required of an enforceable norm of customary international law, there should be no question that it is incorporated into the domestic law of the United States as federal common law to be applied by the federal courts. See Sosa, 124 S.Ct. at 2764-65. Moreover, it is clear that the United States is in violation of that norm with respect to the residents of Puerto Rico. Were we to avoid this conclusion, we would not just be "avert[ing] [our] gaze entirely from [an] international norm intended to protect individuals," id., but would be placing our heads into the sand to avoid seeing the obvious.

In my view, the majority's refusal to incorporate the clear and specific customary international law norm requiring equal political participation into federal common law contravenes both the specific language of the Constitution, see U.S. Const. art. VI, cl. 2, and relevant Supreme Court doctrine, see Sosa, 124 S.Ct. at 2761-62.

The majority's concern that customary international law is a "diffuse and often highly uncertain body of norms," maj. op. at 13, if true regarding other areas of customary international law, is certainly not true of the right to vote, as demonstrated above. Moreover, the majority's contention that "[i]f there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law," maj. op. at 14, misses the point. The international norm at issue here is not "democratic government" generally, but the right to vote in equality with all other citizens of one's nation. The majority studiously fails to provide any example, in any democratic country, in which citizens are classified into voting and non-voting categories. Its reference to Great Britain as an example of diversity in democratic governments in which citizens neither

vote for the head of state nor directly for the governing party, hardly proves the point or even stands for the proposition that customary international law tolerates unequal voting rights among citizens of the same country. In Great Britain, the monarch is only symbolically the head of state. Furthermore, I was under the impression that in 1776 we rejected Great Britain's views regarding colonial government.

C. Remedy

We commence with the premise that plaintiffs-appellants have the right to equal political participation as citizens of the United States, pursuant to customary international law and the ICCPR, both of which are binding on the United States. As observed, the United States is currently in violation of these requirements. Given the failure by the United States to take steps to rectify this clear violation of international law, notwithstanding its agreement to do so, see, e.g., Exec. Order No. 13,107, 63 Fed. Reg. 68, 991 (Dec. 10, 1998), this court ought to take such measures as are necessary to protect a discrete group of citizens that is completely under the sovereignty of the United States. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for correspondingly more searching judicial inquiry.").

Although, assuming the ICCPR is not self-executing, we cannot order legislative action to bring the United States into compliance with its international obligations, a stop-gap measure is available and is justified by plaintiffs-appellants' predicament. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Under this Act, this court may declare the rights, under the ICCPR and customary international law, of the United States

citizens residing in Puerto Rico. "It is emphatically the province and duty of the judicial branch to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Act provides the courts with the option of "declar[ing] the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added), particularly when a declaratory judgment "will serve a useful purpose in clarifying and settling the legal relations in issue . . . ." Aetna Cas. & Sur. Co. v. Quarles, 92 F.3d 321, 325 (4th Cir. 1937) (internal quotation marks omitted).

The power to provide declaratory relief extends to the power to clarify and settle the legal relations between the United States and the inhabitants of territories under Federal administration. See United States v. Sanchez, 992 F.2d 1143, 1150-53 (11th Cir. 1993), rev'd in part on other grounds, 3 F.3d 366 (11th Cir. 1993) (determining that Puerto Rico is not a separate sovereign for purposes of the double jeopardy clause); see also United States v. Lopez-Andino, 831 F.2d 1164, 1167-68 (1st Cir. 1987) (holding that Puerto Rico is a separate sovereign for double jeopardy purposes). "Courts of the United States have final authority to interpret an international agreement for purposes of applying it as law of the United States." Juda v. United States, 13 Cl. Ct. 667, 678 (Cl. Ct. 1987).

1. Redressability

This type of declaratory relief in the present case is fully consistent with the Declaratory Judgment Act, because it is substantially likely that a declaration by this Court that the United States is in violation of international law will result in some form of relief to the United States citizens who reside in Puerto Rico. See Utah v. Evans, 536 U.S. 452, 463-464 (2002). In Evans the Court held that the "redressability" element of standing under Article III and the Declaratory Judgment Act[48] was met in a

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[48] The "case-or-controversy" requirements of Article III and the Declaratory Judgment Act are co-extensive. See Teva Pharm. USA, Inc. v. Pfizer, Inc., 395 F. 3d 1324, 1340 (Fed. Cir. 2005).

situation in which it was "'substantially likely'" that a non-party, co-equal branch of government would abide by a federal court's interpretation of the law "'even though they would not be directly bound by such a determination.'" Id. at 460 (quoting Franklin v. Massachusetts, 505 U.S. 788, 803 (1992)). Standing was established because "the practical consequence of [a court order declaring a census-taking method unlawful] would amount to a significant increase in the likelihood that the plaintiff would obtain relief [from the President] that directly redresses the injury suffered." Id. at 464 (collecting cases in which standing has been found under similar circumstances).

Similarly, in Juda, one can find an example of the legislative branch following the judiciary's interpretation of international law. In that case, the inhabitants of the Marshall Islands -- which the United States held under trusteeship from the United Nations -- challenged the United States' attempt to unilaterally terminate the Trusteeship Agreement by way of Presidential proclamation, which would have contravened the international agreement with the United Nations. The Claims Court declared that the Trusteeship remained in effect de jure as a matter of international law, and set forth the procedure to be followed by the United States to end it under international law. Id. at 678-82. Although not bound by that judicial roadmap, Congress did in fact follow it. See Joint Resolution to Approve the "Compact of Free Association" between the United States and the Government of Palau, Pub. L. No. 99-658, § 101, 100 Stat. 3672 (1986); U.N. Security Counsel Res. 683 (Dec. 22, 1990) (terminating Trusteeship Agreement).

The parallel between these cases and the present situation is self-evident. Judge Lipez's attempt to distinguish them on the basis that "the likelihood that Congress and the President would follow the court's advice was not just 'substantial,' [in those cases], it was a near certainty . . . . [but] [t]here is nothing approaching such certainty here," supra at 28 (Lipez, J., concurring), is unconvincing. With due respect, it is the concurrence that engages in speculation. It seems to me that the prediction that Congress would ignore a declaratory judgment of this court that the United States is not in compliance with its international obligations is simply contrary to experience. Juda, whether dicta or not, see supra at 27 (Lipez, J., concurring), bears this out. We live in a country of laws in which the norm is for all branches of government to respect and comply with the decisions of the courts, irrespective of how disputed they may be. See, e.g., Bush v. Gore, 531 U.S. 98 (2000). I cannot countenance that Congress -- nor, for that matter, the Executive, which negotiated the ICCPR and is thus intimately involved and committed -- would ignore a judgment of this court declaring that the government has taken no action to comply with an international obligation of the United States, negotiated and agreed to by the Executive Branch with the advice and consent of the Senate.

The difficulty, complexity, or length of the process required for the United States to comply with the law of the land is irrelevant, as it has never been a test for redressability of a wrong. Cf. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (ordering racial desegregation of schools occur "with all deliberate speed"). The U.S. citizens of Puerto Rico have waited over one hundred years to regain the voting rights they lost when the U.S. invaded in 1898. A declaratory judgment would be of some help in speeding up the process of recovering these rights.

Regardless, however, of the inappropriateness and unlikelihood of Congressional inaction in response to a judicial declaration of the rights at issue, it cannot be denied that we lack authority to order Congress to act. Even if Congress chooses to continue on its course of inaction, however, our declaration of the plaintiffs' rights under the ICCPR and customary international law would, itself, provide a form of redress. On this point, Federal Election Commission v. Akins, 524 U.S. 11 (1998), is instructive.

In Akins, a group of voters filed an administrative complaint with the Federal Election Commission ("FEC") asking it to force a certain political organization to comply with the reporting requirements for political action committees ("PACs"). See id. at 17. The FEC dismissed the complaint on the ground that the organization did not fit the definition of a PAC under federal law. See id. The voters appealed the FEC's dismissal of their complaint and the FEC defended on the ground that the voters' claim was not redressable. See id. at 19. The FEC argued that, even if it misinterpreted the definition of a PAC, it maintained the option not to act on the voters' complaint as a matter of prosecutorial discretion. See id. at 25. The Court disagreed that the FEC's discretionary authority deprived the voters of standing. See id. The Court explained that, even though the FEC might ultimately decline to act on the voters' complaint, the voters' injury was redressed by assuring that the FEC's discretionary decision was based on a correct understanding of the relevant law.

This case presents an analogous circumstance. The plaintiffs have alleged that Congress has an obligation under the ICCPR and customary international law to further their right to vote for President and that since the ICCPR was ratified, Congress has taken no action in this regard. It is possible that Congress has not acted in accord with its obligations because it is unaware of them. By issuing a declaration stating the plaintiffs' rights under the ICCPR and customary international law, the court can correct this potential misunderstanding. To be sure, an Article III court cannot order Congress to pass a law, just as it cannot order the executive to prosecute a particular case. But, as in Akins, a declaration can ensure that the government actor in question (here Congress) exercises its responsibility with a correct understanding of the relevant legal principles. This is no guarantee that the Congress will exercise its discretion favorably to the plaintiff. But, as Akins makes clear, there is no such requirement. See id. at 25; Evans, 536 U.S. at 464 (stating that redressability is established where court action "would amount to a significant increase in the likelihood that the plaintiff would obtain the relief that directly redresses the injury suffered").

Ultimately, I simply do not agree with Judge Lipez's reading of the Utah and Juda cases, nor with his conclusions

regarding redressability. Obviously, the ideal remedy would be if we could order that plaintiffs be allowed to vote. Barring a finding that the ICCPR is self-executing, that remedy is not available. Continued non-compliance, however, is a circumstance that cannot be ignored any longer. The honor and credibility of the United States are at stake.

Plaintiffs-appellants, citizens of the United States, are denied the right to vote for the offices of President and Vice President of our nation in violation of the ICCPR and customary international law. Further, it is an unquestionable fact that the United States has not met its obligation under the ICCPR to take steps toward allowing these citizens to exercise this fundamental right. See ICCPR art. 2, para. 2. It must be assumed that the United States will give effect to a judicial declaration stating its failure to meet its obligations in this respect, and, at a minimum, we must ensure that any future inaction by the government is not based on an inaccurate understanding of its obligations under international law.

2. "Embarrassment" v. Equality

If the majority were to conclude that plaintiffs-appellants' allegations are not supported by the law, although I obviously disagree with this conclusion, I would accept it as part of the judicial process in which diversity of opinion is a fact of judicial review. However, I cannot accept, and am highly disturbed by, the proposition espoused by the majority that the outcome of this appeal should in any way be dictated by its perception that a declaration by this court that the United States has failed to comply with its treaty obligations might "embarrass" the United States and "could be trumpeted as propaganda in international bodies and elsewhere." Maj. op. at 12. These statements are worrisome because they demonstrate a misperception of the role of federal courts vis-à-vis treaties and other international law. The interpretation of treaties and international law, as an integral part of the law of the land, is a nondelegable judicial duty and function that cannot be avoided by this court. Indeed, federal courts are the final interpreters of treaties. Juda, 13 Cl. Ct. at 678. The United States is just another party in this case, as it is in the thousands that are heard before the federal courts throughout the nation. It has no

higher standing than any other party, and is entitled to no higher privilege than private citizens. It is precisely because the courts of the United States are perceived by the world at large as upholding these high standards of impartiality that a declaration exposing the government's failure to comply with its treaty obligations, rather than "embarrassing" the U.S., as the majority suggests, would have a highly salutary effect by showing the world that we practice what we preach: the rule of law.

Embarrassment indeed! The U.S. should be embarrassed at its denying equal rights to four million of its citizens in this day and age. That fact itself -- particularly in light of the government's intense encouragement of democratic reform in other nations and purported commitment to international instruments that guarantee equal political participation by all citizens -- could be "trumpeted as propaganda in international bodies and elsewhere." Maj. op. at 12. Was it "embarrassment" that finally reversed Plessy? If embarrassment is what it takes to give equal rights to the United States citizens of Puerto Rico, maybe a dose is appropriate.

III.

There comes a point when the courts must intervene to correct a great wrong, particularly one of their own creation, because the political branches of government cannot or will not act. See, e.g., Brown v. Bd. of Educ., 347 U.S. 483. This case is such a crossroads in history. This court cannot further "avert its gaze," Sosa, 124 S.Ct. at 2764-65, without becoming an accomplice to this monumental injustice to Puerto Rico's nationally disenfranchised United States citizens.

Shortly before the Civil War, Abraham Lincoln said: "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy." President Abraham Lincoln, Address to Indiana Regiment (Aug. 1, 19858) in II The Collected Works of Abraham Lincoln 532 (Roy P. Basler ed., 1953) (emphasis removed from original). Substitute "colonized" for "a slave" and "colonizer" for "master" in this quote, and we are where the United States citizens of Puerto Rico find themselves today in their subservient political condition within the United States' political hegemony.

The opinion of the district court should therefore be reversed, and the case remanded for the entry of a declaratory judgment to the effect that the United States has taken no steps to meet its obligations under the ICCPR and customary international law to grant equal voting rights to all citizens in the election of the President and Vice President of the United States.

E pluribus unum.

HOWARD, Circuit Judge, (dissenting). The inability of American citizens residing in the territories to participate in the election of our nation's leaders is antithetical to our foundational democratic values. Like Judge Torruella, Judge Leval of the Second Circuit[49] has observed that excluding these United States citizens from voting for President of the United States poses serious "problems of fairness, resentment and impaired reputation in the community of nations." Romeu v. Cohen, 265 F.3d 118, 128 (2nd Cir. 2001)(Leval, J., writing separately).

Constructively, Judge Leval has explained in some detail how legislation could constitutionally provide for participation by Puerto Ricans in Presidential elections. See id. at 128-30; but see id. at 131-36 (Walker, C.J., disputing that Congress has such power, while sharing the concern "that the U.S. citizens residing in the territories are not being afforded a meaningful voice in national governance."). There is every reason to expect that people of good will serving in our legislative and executive branches would seriously consider Judge Leval's proposal among other options, were the plaintiffs to successfully prosecute this action. But this is not to endorse any particular implementation of voting rights – the preferences of the people of Puerto Rico are of paramount consideration. It is instead to acknowledge that there could be approaches beyond what many have assumed.

More generally, while it may be that the Constitution does not itself confer voting rights upon citizens, generations of Americans have rightly taken as an article of faith their ability to participate in the selection of our national leaders through the franchise.[50] In seeking to participate in the Presidential election,

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[49]Now Senior Circuit Judge.

[50]"[T]he right to vote, as the citizen's link to his laws and

the plaintiffs attempt to assert a right long held by law abiding United States citizens of age, whether at home or abroad, so long as they are not residents of one of the territories. Because the interest represented by the plaintiffs' claim is of paramount importance to our democratic structure, we ought to approach their claim searchingly rather than skeptically,[51] with the understanding that the court's declaratory authority should be exercised to its outermost limits if the claim is otherwise viable. We should take care that the claims of American citizens who assert a basic right to participate in the democratic process do not suffer stillbirth through exacting application of redressability doctrines that, as Judge Torruella has pointed out, have significant flexibility.

Turning directly to the plaintiffs' treaty claim, even if there were a persuasive argument not to accept Judge Torruella's reasoning, the case still should not end at this stage. This is because plaintiffs' claim under the ICCPR should not be resolved

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government, is protective of all fundamental rights and privileges." Evans v. Cornman, 398 U.S. 419, 422 (1970). "[M]ost U.S. citizens have a limited, constitutionally enforceable right to vote in presidential elections as those elections are currently configured. The States have uniformly exercised their Article II authority by delegating the power to appoint presidential (and vice-presidential) electors to U.S. citizens residing in the State to be exercised in democratic elections." Romeu, 265 F.3d at 123.

[51]"Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964); see also Kramer v. Union Free School District, 395 U.S. 621, 626 (1969) ("[C]areful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.").

on a motion under Fed. R. Civ. P. 12(b)(6) without an opportunity for record development.[52]

The United States signed the ICCPR in 1977. Among its provisions, Article 25 provides:

> Every citizen shall have the right and opportunity and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives and to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

999 U.N.T.S. 171 (opened for signature Dec. 19, 1966). The Senate did not provide its advice and consent for the ICCPR until 1992. In consenting to the Treaty, the Senate added a declaration stating that the ICCPR will be "non-self-executing,"[53] as requested

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[52]Beyond my own views expressed here, I agree with much of Judge Torruella's dissent. In particular, I agree substantially with his reasoning in Parts I., II. B. 1., and II. C. 1. and join him in those respects.

[53]Courts and commentators have used the term "non-self-executing" to mean many things. See D. Cinotti, Note, The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land, 91 Geo. L. Rev. 1277, 1279 (2003). For purposes of this opinion, I understand the term to mean that a treaty does not create individually enforceable rights without the passage of implementing legislation. See Columbia Marine Servs., Inc. v. Reffet Ltd., 861 F.2d 18, 21 (2d Cir. 1988) (stating that in order for an action to arise under a treaty for purposes of 28 U.S.C. § 1331, "the treaty must be self-executing, i.e., it must prescribe rules by which private rights may be determined"); J. Paust, Avoiding "Fraudulent" Executive Policy: Analysis of the Covenant on Civil and Political Rights, 42 De Paul L. Rev. 1257, 1258 n.4 (1992) (explaining that the purpose of the non-self-execution declaration in the ICCPR was intended to assure that the Treaty would not create a private cause of action in U.S. courts).

by the executive. S. Exec. Rep. No. 102-23 at 23 (1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.").[54] From this declaration, one might conclude that the plaintiffs do not have enforceable rights under Article 25 of the Treaty.[55] But in my view, separation of powers considerations prevent a court from relying exclusively on the Senate's declaration to determine that a treaty is non-self-executing. The Supremacy Clause and Article III require a court to examine independently the intentions of the treatymakers to decide if a treaty, by its own force, creates individually enforceable rights. While the Senate's preratification view on the matter is entitled to some weight, other facts, including extrinsic evidence concerning the Treaty's negotiation history and international practice under the Treaty, are relevant. Because the procedural posture of this case has precluded introduction of evidence regarding the ICCPR's negotiation and enforcement history, it is premature to dismiss on the ground that the Treaty does not provide the plaintiffs with enforceable rights.

The Senate's practice of declaring certain treaties to be non-self-executing is of relatively recent origin.[56] See L. Henkin,

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[54]Articles 1 through 27 are the rights-granting provisions of the ICCPR.

[55]It might also be said that as a prudential matter the Senate's declaration precludes relief under the Declaratory Judgment Act. For the reasons expressed herein, I would not decide this prudential question at the motion to dismiss stage.

[56]This practice appears to be, at least in part, a response to the proposed Bricker Amendment, which would have amended the Constitution to require implementing legislation before a treaty could have domestic effect. See S.J. Res. 130, printed at 98 Cong. Rec. 907-08 (1952). Some scholars have concluded that the Senate viewed non-self-executing declarations as a way to achieve the objectives of the Bricker Amendment without having to amend the Constitution. See L. Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341, 348-50 (1995). See also D. Sloss, The Domestication of

Foreign Affairs and the United States Constitution, 201-02 (2d ed. 1996). This practice has become commonplace especially, although not exclusively, for human rights treaties, see L. Damrosch, The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties, 67 Chi-Kent L. Rev. 515, 519-26 (1991), and has been accepted in some quarters, see Restatement (Third) of Foreign Relations Law of the United States § 303, cmt. d (1986) (stating that there is no accepted doctrine indicating limits on the conditions that the Senate may impose on its provision of consent), but "without significant discussion," Henkin, Foreign Affairs, supra at 202.

Unlike in some other countries, treaties become part of the fabric of our domestic law upon ratification. Carlos Manuel Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 Colum. L. Rev. 1082, 1111 (1992) (describing the rule under British law that a treaty does not have domestic effect until Parliament passes implementing legislation). This is a direct result of the Supremacy Clause, which makes treaties part of the "supreme law of the land" along with federal statutes, federal common law, and the Constitution itself. U.S. Const. art. VI, cl. 2.[57] The Constitution's grant of power to the federal judiciary also recognizes that treaties constitute domestic law. Under article III,

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Int'l Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 Yale J. Int'l L. 129, 173 (1999).

[57]The Supremacy Clause states:

> This Constitution, and the Laws of the United States made in Pursuance Thereof; and all which shall be made in Pursuance Thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding. (Emphasis supplied).

§ 2, cl. 1, the federal judicial power "extend[s] to all Cases, in Law and Equity arising under . . . Treaties." The express language of the Constitution thus provides that a treaty ratified by the President, after the Senate's advice and consent, see U.S. Const. art. II, § 2, cl. 2, is part of our domestic law and may be enforced in a domestic court.

This is not a historical accident, for incorporating treaties into the domestic law was one of the purposes for drafting the Constitution. Under the Articles of Confederation, the States were reluctant to enforce treaties entered into by the national government. In proposing the Virginia Plan as the working draft for the new Constitution, Edmund Randolph complained about the Articles' powerlessness to "cause infractions of treaties . . . to be punished." 1 M. Farrand, The Records of the Federal Convention of 1787 19 (rev. ed. 1996). James Madison shared this view. He claimed that "experience [under the Articles] had evidenced a constant tendency in the States to . . . violate national Treaties . . . ." Id. at 164. The Constitution sought to remedy this tendency by making treaties "the supreme law of the land."

The Framers' intention to establish treaties as law, without further legislative action, is demonstrated by several of the proposals that the Constitutional Convention rejected. One such proposal would have required that treaties be sanctioned by legislation if they were to have "the operation of laws." J. Madison, Notes of Debates in the Federal Convention of 1787 520 (1966 ed.). Another would have established two types of treaties: one requiring only action by the President and the Senate, and a second requiring additional action by the House of Representatives. See 2 Farrand, supra at 394. The rejection of these proposals illustrates the Framers' intention that all treaties constitute law under the Supremacy Clause.[58] As James Wilson

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[58]In a similar vein, the Committee on Style removed from the final version of the Supremacy Clause language that would have given the national government the power to "enforce treaties." The Committee removed this language because it was redundant; the Supremacy Clause already declared that treaties were law. See Farrand, supra, at 389-90.

stated: "[The Supremacy Clause] will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure [their] performance no longer nominally, for the judges of the United States will be enabled to carry [them] into effect." 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 490 (2d ed. 1881).

The expectation that treaties would become operative as domestic law upon ratification is also expressed in the Federalist Papers and the ratification debates within the States. For example, in Federalist No. 22, Alexander Hamilton explained that "the treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." The Federalist No.22 at 150 (C. Rossiter ed. 1961). Similarly, at the North Carolina ratifying convention, one of the Constitution's supporters explained:

> It was necessary that treaties should operate as laws on individuals. They ought to be binding upon us the moment they are made. They involve in their nature not only our own rights, but those of foreigners and should be protected by the federal judiciary.

4 Elliot, supra at 158. Even those opposing ratification shared in this view. "Brutus," in criticizing Article III, stated that he could "readily comprehend what is meant by deciding a case under a treaty. For as treaties will be the law of the land, every person who has rights or privileges secured by a treaty, will have the aid of courts in recovering them." 16 J. Kaminski and G. Saladino, The Documentary History of the Ratification of the Constitution 172 (1984).

One commentator has summarized the founding period evidence as follows:

> [The] historic patterns of expectation demonstrate that most Framers intended all treaties immediately to become binding on the whole nation, superadded to the laws of the land; to be observed by every member of the nation, to be applied by the courts

> whenever a cause of action arose from or touched upon them; and to prevail over and preempt any existing state action. In these ways, at least, all treaties (to the extent of their grants, guarantees, or obligations) were to be self-executing.

See J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760, 764 (1988).[59]

This understanding quickly found its way into the United States Reports. See Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). Ware concerned the 1783 Peace Treaty with Great Britain. The plaintiff, a British citizen, claimed that he was owed a debt by a Virginia citizen. See id. at 199-201. The defendant claimed that the debt had been extinguished by a 1777 Virginia statute. See id. The treaty provided, however, that "creditors, on either side, shall meet with no lawful impediment to the recovery of full value of all bona fide debts heretofore contracted." Id. at 277. The British plaintiff argued that this treaty provision overrode the Virginia statute and reinstated the debt. See id. at 209.

Justice Iredell, sitting as a circuit judge, considered whether the treaty was operative without the passage of any additional domestic legislation. He recognized that, under the law of Great Britain, a treaty would not be operative domestically without implementing legislation, but that the purpose of the Supremacy Clause was to differentiate the effect of treaties under American law:

> Under this constitution, therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also, by the vigor of its own authority, to be executed in fact. It would not

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[59]For a fuller discussion, see Paust, supra; Vázquez, supra; and M. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land", 99 Colum. L. Rev. 2095 (1999). For an alternate interpretation of the Founding period, see J. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999).

> otherwise be the supreme law, in the new sense provided for, and it was so before, in a moral sense. . . . [W]hen the constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.

Id.

The case went to the Supreme Court, where each Justice wrote his own opinion. No Justice disagreed with Justice Iredell's explanation of the domestic effect of the treaty. See id. at 237 ("[E]very treaty made by authority of the United States, shall be superior to the constitution and laws of any individual state. . . .") (Chase, J.). Ware thus supports the view that, when a treaty creates obligations favoring an individual, the individual may enforce the obligation directly in a United States court, even though there is no implementing legislation.[60] In other words, under American law, treaties can be self-executing. See Head Money Cases, 112 U.S. 580, 598-99 (1884) ("A treaty . . . is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen . . . may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.").

The suggestion that some treaties are not self-executing first appeared in Foster v. Nielson, 27 U.S. (2 Pet.) 253 (1829), overruled in part by United States v. Percheman, 32 U.S. 51 (1833) (reinterpreting treaty in light of new evidence regarding meaning of ambiguous term). There, a treaty with Spain, designed to protect private land grants, provided that "grants shall be ratified and confirmed." Id. at 309. Writing for the Court, Chief Justice

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[60]In another early case, Chief Justice Marshall echoed this sentiment. Owings v. Norwood Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) ("Whenever a right grows out of, or is protected by a treaty, it is to be protected.").

Marshall concluded that the treaty was not self-executing because, by its terms, it did not establish a right in an individual but rather placed an obligation on the legislative branch to act. See id. at 314. As Chief Justice Marshall explained:

> Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, where either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can be become a rule for the court.

Id.

The Foster rule -- that certain treaties are non-self-executing -- is a judicially-created doctrine. See Henkin, The Ghost of Senator Bricker, supra at 347. Under this doctrine, a court must ascertain whether the instrument was intended by its makers to establish directly enforceable rights, or only to impose an obligation on one of the political branches. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 30, 373 (7th Cir. 1985) ("Whether a treaty is self-executing is an issue for judicial interpretation."); Restatement supra at § 111, cmt. h ("Whether an agreement is to be given effect without further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law."). Such an intent is to be gleaned from the treaty's terms and history. See Diggs v. Richardson, 555 F.2d 841, 851 (D.C. Cir. 1976) (stating that, "[i]n determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution").

Given this constitutional and judicial history, a court ought not quickly conclude that treaties are non-self-executing. Cf. United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (en banc) (stating that there is a presumption against self-executing treaties

under American law).[61] Rather, a court must conduct an independent and searching inquiry into the treaty's purpose. And on this point a declaration by the Senate that a treaty is non-self-executing should not be dispositive.

Those holding a contrary view tend to regard the Senate's power to declare a treaty non-self-executing to be an adjunct of its general power to consent to ratification. See Restatement supra at § 303, cmt. d. There is no doubt that the Senate may hinge its consent to ratify a treaty on a reservation. See Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869). But a reservation is a "unilateral statement . . . whereby [one party] purports to exclude or to modify the legal effect of certain provisions of the treaty in the application to that State." Vienna Convention on the Law of Treaties, art. 2(1)(d) (1969). A reservation thus has an actual effect on the terms of the treaty. See M. Glennon, The Constitutional Power of the United States Senate to Condition Its Consent to Treaties, 67 Chi.-Kent. L. Rev. 533, 542 n. 63 (1991) (citing authority). And the reservation will vitiate the Senate's consent if its terms are not incorporated into the treaty. See Henkin, Foreign Affairs, supra at 180-81.

A non-self-execution declaration differs materially from a reservation. See Restatement, supra at § 314, cmt. d. The declaration is not presented to the other international signatories as a request for a modification of the treaty's terms. Rather, it is directed primarily toward United States courts to express "the sense of the Senate" that the treaty should not be interpreted to establish individually enforceable rights. As two leading commentators have explained, the Senate does not have the power to bind a court to such declarations:

> [T]he Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in

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[61] Judge Torruella took a similar view in his dissent in Li. See 206 F.3d at 70-71.

> the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate's declaration is not law. The Senate does not have the power to make law outside the treaty instrument.

S. Riesenfeld & F. Abbott, Foreword: Symposium of Parliamentary Participation in the Making and Operation of Treaties, 67 Chi.-Kent L. Rev. 293, 296-97 (1991).[62]

Stated differently, the Senate's power under Article II extends only to the making of reservations that require changes to a treaty before the Senate's consent will be efficacious. A declaration that only has domestic effect is, in reality, an attempt to legislate concerning the internal implementation of a treaty. But

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[62]Other commentators, including Professor Henkin, share this view. See Henkin, Foreign Affairs, supra at 202 (describing the Senate's practice of declaring treaties as non-self executing to be "anti-Constitutional in spirit and highly problematic as a matter of law"); Henkin, The Ghost of Senator Bricker, supra at 346 (stating that non-self-execution declarations by the Senate "may be unconstitutional"). See also D. Cinnoti, supra; J. Quigley, The Rule of Non-Inquiry and Human Rights Treaties, 45 Cath. L. Rev. 1213 (1995); J. Quigley, The Int'l Covenant on Civil and Political Rights and the Supremacy Clause, 42 De Paul L. Rev. 1287 (1993); Paust, Avoiding Fraudulent Executive Policy, supra; C. Dearborn, Note, The Domestic Legal Effect of Declarations that Treaty Provisions Are Not-Self-Executing, 57 Tex. L. Rev. 233 (1979).

the power to legislate is not granted to the Senate under Article II. Legislation may only be enacted through bicameral adoption and presentation to the President as set forth in Article I. See INS v. Chada, 462 U.S. 919 (1983).

The only case that I am aware of that addresses a similar question supports this view. In Power Authority of New York v. Federal Power Commission, 247 F.2d 538 (D.C. Cir.), vacated and remanded with instructions to dismiss as moot 355 U.S. 64 (1957), the United States entered a bilateral treaty with Canada concerning the use of the Niagara River to produce power along the United States/Canada border. See id. at 539. In its resolution consenting to the treaty, the Senate included a reservation whereby the United States reserved the right to redevelop its portion of the power generated on the river only through an act of Congress. See id. The United States and Canada agreed that the reservation only concerned American domestic law and did not require any changes to the treaty. See id. at 540-41.

The Power Authority of the State of New York sought a license from the Federal Power Commission to use the Niagara River for the state's anticipated power project. See id. at 539. The Commission dismissed the authority's license application, contending that the Senate's reservation precluded it from granting such a license because federal legislation was required. See id. at 539-40.

The D.C. Circuit held that the reservation was ineffective because it involved only United States domestic law. For the reservation to be binding on the judiciary, the court reasoned, it had to constitute an actual part of the treaty:

> A true reservation which becomes a part of a treaty is one which alters the effect of the treaty insofar as it may apply in the relations of the State with the other State or States which may be parties to the treaty. It creates a different relationship between the parties and varies the obligations of the parties proposing it.

Id. at 541. Because the reservation was merely an expression of the Senate's view of domestic policy it had no domestic effect. See id.[63]

The non-self-execution declaration in the ICCPR is a similar expression of the Senate's desire concerning a purely domestic issue. Like the reservation in Power Authority, the declaration was not intended to modify the Treaty terms in any way. Thus, it lacks binding force. Cf. Fourteen Diamond Rings v. United States, 183 U.S. 176, 178-80 (holding that a Senate resolution purporting to interpret a treaty adopted after ratification was not binding). Of course, the Senate's view is relevant. Cf. United States v. Stuart, 489 U.S. 353, 366-67 (1989) (stating that Senate preratification debate is relevant to determining the meaning of a treaty). But, in the end, whether there is a private right of action under the ICCPR should be decided on the basis of the totality of available evidence. See Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694, 700 (1988) ("Treaties are construed more

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[63]Sosa v. Alvarez-Machian, 124 S. Ct. 2739 (2004) is not to the contrary. That case involved whether the right to be free from arbitrary abduction and detention was protected under customary international law. The plaintiff in Sosa did not sue directly under the ICCPR but rather argued that the Treaty's terms helped establish the relevant principle of customary international law for purposes of his Alien Tort Act claim. The Court relied on the Senate's non-self-execution declaration in the ICCPR as one factor to support its conclusion that the ICCPR could not, by itself, establish a rule of customary international law. See id. at 2763 & 2767. But the Court was not faced with (and did not decide) whether the Senate's declaration ipso facto prevents a plaintiff from suing directly under the Treaty. Because the question in Sosa was not the binding effect of the Senate's non-self-execution declaration in determining whether the ICCPR establishes a private cause of action, the parties did not present the Court with (and it did not address) the separation of powers arguments questioning the Senate's authority to issue such declarations. See, e.g., Reply Brief of United States at 8, Sosa, supra.

Meanwhile, while nearly half of the population of Puerto Rico lives below the poverty level,9 compared to 12.5% in the United States,10 the Supreme Court in Harris v. Rosario, 446 U.S. 651 (1980), validated the discriminatory treatment by Congress in the payment of Social Security benefits to Puerto Rico residents vis-à-vis those on the Mainland, stating as one of the grounds for this outcome that granting the same benefits to the residents of Puerto Rico could disrupt the local economy. Id. at 651. See also Califano v. Torres, 435 U.S. 1, 5 n.7 (1978). It should be noted that Puerto Rico residents pay the same Social Security tax as the citizens who reside in the states and receive full benefits.

This brief and admittedly superficial synopsis of some of the conditions extant in the relationship between the United States and its citizens in Puerto Rico, does not, of course, tell the whole picture or even the most important components of this lopsided situation.11 Together with others of a more fundamental kind, however, they manifestly establish the colonial nature of the U.S.-Puerto Rico relationship.12

The conundrum created by the Insular Cases13 and People

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9 The poverty rate in Puerto Rico in 2000 was 48.2%. Personas por Debajo del Nivel de Pobreza por Municipio, Censo de 2000, Oficina del Censo, Gobierno de Puerto Rico, available at, http://www.censo.gobierno.pr/Censo_Poblacion_Vivienda/Datos_Historicos/Datos_Nivel_Pobreza_2000.htm.

10 Income, Poverty, and Health Insurance Coverage in the United States: 2003, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau.

11 For a starter, see Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1984).

12 See José Trías Monge, Puerto Rico: The Trials of the Oldest Colony in the World (1997).

13 Ocampo v. United States, 234 U.S. 91 (1914); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 162 U.S. 244 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901). In a nutshell, these cases created the status of unincorporated territory whereby Puerto Rico, Guam

liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty negotiations, and the practical construction adopted by the parties."); see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 534 (1987) (stating that treaty interpretation begins with the text of the treaty, but that the treaty's history and practical construction adopted by the parties are relevant); Air France v. Saks, 470 U.S. 392, 400 (1985) (stating that "in interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation"); Islamic Rep. of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985) (explaining that the most important factor in determining whether a treaty is self-executing is the language, purpose, and intent behind the treaty).

Given the broad judicial inquiry required to determine if a treaty establishes individually enforceable rights and the non-binding nature of the Senate's non-self-execution declaration, I do not think it proper to affirm the dismissal under Fed. R. Civ. P. 12(b)(6). See Paust, Avoiding "Fraudulent" Executive Policy, supra at 1259-62 (suggesting that text of ICCPR indicates that it was intended to be self-executing). We do not have before us sufficient information concerning the negotiation history of the ICCPR or the way in which the other signatories have enforced it. Without such information, we lack the full spectrum of sources necessary to evaluate the extent to which, if at all, the plaintiffs may possess one or more enforceable rights under the Treaty.

A "court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of the actual facts rather than a pleader's suppositions." 5A Wright & Miller, Federal Practice & Procedure, § 1357; see also Doe v. Walker, 193 F.3d 42, 46 (1st Cir. 1999)("Our preference for a better record is well supported and . . . is one which we are entitled to require for reasons of prudence."). When looked at the way I see it, this suit presents a novel claim concerning the right to vote – a right which, as I have said, has special significance. See Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating that "no right is more precious in a free country than that of having a voice in the election of those who make the

laws, under which, as good citizens, we must live"). Given the sensitive nature of the dispute and its implications, I would permit the parties to develop a record concerning the ICCPR.[64]

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[64]I am less sanguine about whether plaintiffs may successfully press a claim under customary international law. The most promising avenue for challenging Puerto Rico's status as violative of a customary international norm -- a claim arguing that customary international law recognizes a right of peoples to self-determination and imposes on nations an obligation to decolonize -- more properly belongs not to an individual Puerto Rican, but to the Commonwealth of Puerto Rico itself, the political leadership of which is elected by individual Puerto Ricans and, presumably, would be responsive to the electorate. See, e.g., Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59, 80 (1978); Laurence H. Tribe, American Constitutional Law, § 3-19 (3d ed. 2000); Erwin Chemerinsky, Constitutional Law Principles and Policies, § 2.5.4 (2d ed. 2002). In such a lawsuit, there would be less reason for concern that the plaintiffs might be seeking a fundamental change in the relationship between the Commonwealth and the United States that many of their fellow Puerto Ricans may not desire.

ANNEX B

United States Court of Appeals
For the First Circuit

No. 04-2186

GREGORIO IGARTÚA de la ROSA, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Before

Boudin, Chief Judge,

Torruella, Selya, Lynch, Howard and Lipez, Circuit Judges.

Dated: May 12, 2005

MEMORANDUM AND ORDER

Per Curiam. Following a panel decision in this case, Igartua-De La Rosa v. United States, 386 F.3d 313 (1st Cir. 2004), a petition for rehearing was filed seeking panel rehearing or rehearing en banc. The panel thereafter granted rehearing and asked the parties to address two issues: first, the plaintiffs' claim that the United States was in default of its treaty obligations and, second, the availability of declaratory judgment concerning the

government's compliance with any such obligations. The rehearing order vacated the original panel decision. Igartua-De La Rosa v. United States, 2005 WL 857110 (1st Cir. Mar. 14, 2005).

Given the importance of the issues, a majority of the active judges then voted that the rehearing should be en banc. The original panel comprised two active judges and one senior judge, all of whom participated in the panel decision which is now being reconsidered. Under the governing statute, a court that rehears a case en banc is comprised of all active judges, except that any senior judge of the circuit may participate in an en banc court "reviewing a decision of a panel of which such judge was a member." 28 U.S.C. § 46(c) (2000).

The question has been raised whether the senior circuit judge who participated in the panel decision is eligible to sit on the en banc court in this case. A vote and a formal order have been requested on this issue. Accordingly, the active judges have determined, by a five to one vote, that the senior circuit judge is entitled to sit on the rehearing en banc.

For some years, it has been the practice of this court, when granting rehearing en banc, to vacate the panel decision in the same order. See e.g. United States v. Councilman, 385 F.3d 793, 793 (1st Cir. 2004); Savard v. Rhode Island, 338 F.3d 23, 25 (1st Cir. 2003) (en banc); Irons v. F.B.I., 880 F.2d 1446, 1447 (1st Cir. 1989) (en banc). A reason for this practice is that a grant of rehearing en banc almost invariably results in a new decision, whether the outcome differs from or duplicates the result reached by the panel. No such order was issued in this case by the en banc court because the panel decision had already been withdrawn when panel rehearing was granted.

Given this past practice, it could be argued in most cases where this court has previously reheard cases en banc, that-- in a mechanical sense—the en banc court is "reviewing" not the panel decision but the judgment of the district court. But this reading would ignore the thrust and purpose of the statute, the substance of what is happening when rehearing en banc is granted, and long established practice in this court. Each point deserves brief elaboration.

First, the thrust and purpose of the statute is to assure that where the senior circuit judge has participated in the panel

decision, a rehearing of the case en banc will include the senior circuit judge as a member of the en banc court if he chooses to participate. See S. Rep. No. 97-275, at 27 (1981). This gives the en banc court the benefit of the knowledge and judgment of all of the judges of this circuit who sat on the panel that rendered the initial decision. That rationale directly supports the participation of the senior circuit judge in the en banc proceeding in this case.

Second, an en banc decision, following a panel decision, is in substance reviewing the work of the panel regardless of whether the panel opinion has or has not been formally withdrawn at the time of the rehearing. See, e.g., JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 49 (1st Cir. 1999) (en banc) (reinstating portion of vacated panel opinion). The issue on rehearing en banc virtually always turns on something the panel decided or failed to decide. Whether the panel decision is withdrawn at the beginning or end of the en banc process, the en banc court's action is in its essence one that either reaffirms or alters what the panel has decided.

Third, the unvarying practice of this court for many years has been to include on the en banc panel any senior circuit judge of this circuit who sat on the original panel and chooses to participate. This practice is not affected by the fact that the panel in this case withdrew its decision while the en banc petition was pending; given our past practice, a withdrawal of the panel decision by the en banc court itself has never prevented a senior circuit judge who sat on the panel from sitting on the en banc court.

Fourth, what little precedent exists on the interpretation of the statute directly supports the participation of the senior circuit judge in this case. The leading opinion, United States v. Hudspeth, 42 F.3d 1013 (7th Cir. 1994) (Posner, C.J.), articulates the rationale set forth above; pertinently, that case upheld the inclusion on the en banc court of a senior circuit judge who had participated on the panel, even though the panel had not issued a decision prior to the grant of an en banc hearing. That rationale applies a fortiori to our own case in which the panel did issue a decision.

Accordingly, the senior circuit judge who participated in the panel decision in this case is entitled to sit on the en banc court. It is so ordered.

Dissent follows.

TORRUELLA, Circuit Judge (Dissenting). The convening of this en banc court is unfortunate, for it conducts its deliberations under the pall of two weighty errors, one of judgment and the other of law.

On October 14, 2004, a duly constituted panel of this court promulgated its opinion rejecting petitioners' claims, and issuing a judgment to said effect. Thereafter, they petitioned for rehearing by the panel, and in the alternative, for en banc consideration. After due deliberations, on March 14, 2005 the panel that heard the appeal unanimously voted to rehear the case, and consistent therewith, contemporaneously withdrew the panel opinion and judgment. Thus, the pending en banc request was mooted. The panel additionally ordered the United States and petitioners to file briefs on specific issues, set a date for oral argument, and invited intervention by amicus curiae. Both the United States and petitioners filed their briefs by April 14, 2005, and several amici intervened and filed briefs by April 22, 2005.

Thereafter, on April 25, 2005, motu propio, a majority of the active judges of the court, in an action which is unprecedented in my judicial experience, quashed the duly constituted three-judge panel, and decided that the matter should be considered by an expanded seven-judge en banc court. Although I do not question the legal authority of the majority of this court to so act, I believe that given the juncture of this appeal when it took this anomalous course, its decision demonstrates poor judgment and shortsightedness, particularly when this error was compounded by the inclusion of a senior judge who does not meet the requirements of 28 U.S.C. § 46(c)(1) as a member of the en banc court. The traditional practice referred to in the majority's opinion is totally inapposite to the procedural circumstances of the instant case, and, in any event, circuit tradition cannot eliminate our obligation to comply with statutory law.

It is clear that the decision of the rehearing panel to withdraw its decision and judgment preceded the en banc order. Thus, the senior judge in question does not qualify to sit on the en banc court, as the unambiguous language of the statute allows participation of a senior judge in an en banc proceeding only when it is "reviewing a decision of a panel of which such judge was a member." Id. After the panel withdrew its opinion and judgment,

it had before it for review only the district court opinion from which the appeal had been taken. Had the matter been allowed to run its course without interference by the en banc order, it is the appeal from the district court opinion that the rehearing panel would have passed upon. Thus, it is that opinion now before the en banc court, not "a decision of a panel of which [the senior judge] was a member." Id.

To my knowledge, no circuit has held otherwise. While the Seventh Circuit has interpreted Section 46(c) to permit a senior judge who sat on a panel to participate in en banc review granted before the original panel decision ever issued, the procedural setting of that case is distinct from the one currently before us. See United States v. Hudspeth, 42 F.3d 1013 (7th Cir. 1994). In Hudspeth, the Seventh Circuit limited its broad interpretation of "reviewing a decision of a panel" to the case before it in which the panel had prepared and agreed on a decision, which "was all set to be released when the grant of rehearing en banc intercepted it." Id. at 1014. In such a case, the court could see "no rational difference, so far as participation by a senior judge is concerned, between that case and one in which rehearing en banc is granted after the panel decision is issued. In both cases, the panel has finalized its decision, although in only one has the decision been issued." Id. In the instant case, however, the panel has clearly not finalized its decision, as it chose to withdraw it, vacate the corresponding judgment, and schedule oral arguments in order to aid its reconsideration of the merits.

A narrower interpretation of Section 46(c) is required by the instant circumstances, and supported by the legislative history. That section was originally amended in 1963 to provide that a senior judge "shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat . . . at the original hearing thereof." See S. Rep. 97-275, 97th Cong., 1st Sess., 1982 U.S.C.C.A.N. 11, at 37 (emphasis added). In Allen v. Johnson, 391 F.2d 527 (5th Cir. 1969), the Fifth Circuit correctly interpreted this language to permit the participation in en banc of a senior judge who had participated in the panel hearing, even though no panel decision had yet been issued. The statutory language, however, was removed in 1978 due to administrative concerns, only to be replaced in 1982 in order to "permit a senior

judge sitting on an original hearing panel to participate in en banc review of that panel's decision." Id. (emphasis added). Although the Senate Report acknowledged the potential value of a senior judge's contributions, it chose not to replace the language requiring the senior judge to have participated in the "panel hearing," but instead required the judge's participation in the "panel decision."

In my view, we must draw the same distinction here. While a senior judge participated in the panel hearing of this case, panel rehearing had been granted and there is currently no panel decision available for the en banc court to review. I therefore vote against the senior judge's participation in en banc review of the decision below.

By the Court:

/s/
Richard Cushing Donovan, Clerk

[cc: Mr. Igartua de la Rosa, Mr. Katsas, Ms. Munoz-Acosta, Mr. Voltaire, Mr. Collette, & Mr. Singer.]

ANNEX C

United States Court of Appeals
For the First Circuit

No. 04-2186

GREGORIO IGARTÚA-DE LA ROSA, ET AL.,

Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, U.S. Senior District Judge]

Before

Torruella, Circuit Judge,
Campbell, Senior Circuit Judge,
and Howard, Circuit Judge.

Gregorio Igartúa-de la Rosa, pro se.

Gregory G. Katsas, Deputy Assistant Attorney General, with whom Peter D. Keisler, Assistant Attorney General, H.S. García, United States Attorney, Michael Jay Singer and Matthew

M. Collette, Attorneys, Appellate Staff, Civil Division, were on brief, for appellee.

October 14, 2004

Per Curiam.[1] Gregorio Igartúa de la Rosa ("Igartúa") brings his federal constitutional appeal to us a third time, contending that his inability to vote for the President and Vice-President of the United States of America on account of his residency in Puerto Rico is a redressable violation of his right to equal protection as a United States citizen. We affirm the district court's dismissal of his claim, relying on our prior dispositions in Igartúa de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995) ("Igartúa I") and Igartúa de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) ("Igartúa II"). In Igartúa II, referring to Igartúa I, we noted that "this court held with undeniable clarity that the Constitution of the United States does not confer upon United States citizens residing in Puerto Rico a right to participate in the national election for President and Vice-President." Igartúa II, 229 F.3d at 83.

Our prior opinions canvass the relevant constitutional landscape. Igartúa II, 229 F.3d at 83-84; Igartúa I, 32 F.3d at 9-11. We need only observe that Igartúa has raised no argument that would bring the matter outside the usual "rule that earlier decisions are binding." Igartúa II, 229 F.3d at 84 (discussing the two exceptions to the rule). Under First Circuit precedent, a panel such as ourselves is bound in the present circumstances by a prior panel's ruling. Only the en banc court, i.e. all the judges of the First Circuit sitting together, can alter a prior panel precedent. See Williams v. Ashland Eng'g Co., Inc., 45 F.3d 588, 592 (1st Cir. 1995) ("An existing panel decision may be undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling."). And, of course, the Supreme Court of the United States may, by certiorari or subsequent precedent, overrule a circuit opinion. Id. Indeed, it seems apparent that a definitive constitutional ruling of the magnitude sought here can, in the final analysis, only emanate authoritatively from the Supreme Court itself.

Affirmed.

(Dissenting Opinion follows.)

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1 Campbell, Senior Circuit Judge and Howard, Circuit Judge.

TORRUELLA, Circuit Judge (Dissenting). David Hume, that most seminal of British philosophers, in his essay That Politics May Be Reduced To A Science,2 stated that "[i]t may easily be observed that though free governments have been commonly the most happy for those who partake of their freedom, yet are they most ruinous and oppressive to their provinces." Although this was a statement made with more direct reference to England's relationship to Ireland and its people, it is not one that is totally irrelevant to that between the United States and Puerto Rico and the four million United States citizens who reside there.

If on the one hand it can be argued that Puerto Rico and its "citizens" are better off materially than they were when the island was invaded 106 years ago,3 the undeniable fact is that it has been, and continues to be, at the basement of the American hegemony. One indicium of this condition is its comparative economic condition. Its residents have an annual per capita income of

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2 David Hume, Political Essays 15 (Charles W. Hendel ed., 1953).

3 The estimated infant mortality rate for 2004 is 8.37 deaths per 1,000 live births. Central Intelligence Agency, World Factbook (2004), Puerto Rico, available at http://www.odci.gov/cia/publications/factbook/print/rq.html (last visited Oct. 8, 2004). Life expectancy is 77.49 years. Id. The death rate is 7.77 per thousand, and the birth rate is 14.1 births per thousand. Id. The literacy rate is 94.1%. Id. Gross Domestic Product ("GDP") per capita in 2003 was $16,800. Id. In 1933, in comparison, the infant mortality rate was 139.4 deaths per 1,000 live births. Compendio de Estadísticas Sociales - 1981, P.R. Planning Board, San Juan (1982). Life expectancy in 1902 was 36.36 years. Id. The birth rate in 1900 was 40.5 births per thousand. United States-Puerto Rico Commission on the Status of Puerto Rico 151, Table C1-5 (1966). The death rate in 1900 was 25.3 per thousand. Id. Literacy in 1899 was 20.4%. José Vázquez Calzada, La Población de Puerto Rico y su Trayectoria 82, tbl.59 (1978) (unpublished). GDP per capita in 1930 was $122. Daniel Creamer, The Net Income of the Puerto Rican Economy 1940-1944, at 21-22 (n.d.). In the fiscal year 2000, federal expenditures in Puerto Rico amounted to $12.1 billion. Bureau of the Census, U.S. Dep't. of Commerce, Consolidated Federal Funds Report (2000), available at http://www.census.gov/prod/2001pubs/cffr-00.pdf.

$16,800 in contrast with those of Mississippi, the poorest state, at $23,448 per capita. It is even more disparate if we look to the national average, which is $37,800.4 The unemployment rates officially average over 11%, although they are de facto much higher. Even at the official rate, however, they stand at twice the national average.5 While these dismal statistics prevail, Puerto Rico is second only to Mexico as a market for U.S. goods in Latin America6 and several billion dollars are "repatriated" annually from Puerto Rico to the Mainland by U.S. based companies doing business in Puerto Rico,7 while sheltered from the I.R.S.8

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4 Current income figures come from the Central Intelligence Agency, World Factbook, and the U.S. Department of Commerce, Bureau of Economic Analysis. As a matter of historical comparison, in 1930, Puerto Rico had a per capita GDP of $122, compared to Mississippi's $202 and the overall U.S. figure of $619. 62 Bureau of Economic Analysis, U.S. Dep't. of Commerce, Survey of Current Business, 8 (Aug. 1982).

5 Bureau of Labor Statistics, U.S. Dep't of Labor.

6 During July to December 2003, Puerto Rico received $8.65 billion in U.S. exports, leading Brazil, the next largest market for U.S. exports in Latin America, which received $5.98 billion during that period. Mexico received $50.82 billion in U.S. exports during the same period, a figure more than four times smaller than Puerto Rico's, once adjusted for population. Making Manufacturing Operations in Puerto Rico More Competitive, 29 Puerto Rico Business Review 1, (Mar. 2004); U.S. Trade (Imports, Exports and Balance) by Country, Foreign Trade Statistics, U.S. Census Bureau, available at http://www.census.gov/foreign-trade/balance/index.html.

7 Ingresos Netos al Fondo General del Gobierno Estatal, Departamento de Hacienda, Gobierno de Puerto Rico, available at (showing amounts paid in so-called "toll gate" tax to the Commonwealth of Puerto Rico on capital exiting the island).

8 The income tax provisions of the Internal Revenue Code are inapplicable to most income derived from Puerto Rico sources. 26 U.S.C. § 933. This is an irrelevant benefit to most residents of Puerto Rico because of their low income levels. United States companies are able to "repatriate" income pursuant to I.R.C. § 30A. 26 U.S.C. 30A.

v. Balzac, 182 U.S. 298 (1922), not only gives underlying support to this subservient condition, but more importantly, it relegates the U.S. citizens who reside in Puerto Rico to perpetual inequality by insulating the political branches of government from any effective pressure from these citizens, who have neither voting representation in Congress nor the right to vote for the offices of President and Vice-President. Additionally, the laws enacted by Congress are applied to them without their participation in their enactment, or consent in their application. This abusive shield and undemocratic condition can only be penetrated by the unpolitical branch of government. Only the judicial branch can correct this denigrating and unacceptable condition, one which was created in the first place by that branch in the Insular Cases, et al. The dead end with which these citizens are today faced was forecast by Justice Harlan in his dissent in Downes when he said: "The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces -- the people inhabiting them to enjoy only those rights as Congress chooses to accord to them -- is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution." Downes, 182 U.S. at 380 (Harlan, J. dissenting).

The doctrine of inequality created by the Supreme Court in the Insular Cases stands on the same discredited theoretical footing as that espoused by the majority in Plessy v. Ferguson, 163 U.S. 537 (1896),14 and which was put to rest by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954). Had the Supreme Court awaited for the political branches to correct the gross injustice perpetrated by Plessy upon the discrete minority against which it was directed, it is likely that state-sponsored racial segregation would still be with us. Equally on point, it is the

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and the Philippine Islands were held to be subject to Congress's plenary power pursuant to the territorial clause of the Constitution. See U.S. Const. art. IV, § 3, cl. 2. Together with the ruling in Balzac, decided after the grant of U.S. citizenship to the residents of Puerto Rico, the Court decided that only "fundamental rights" under the Constitution were extended to Puerto Rico. See Balzac, 258 U.S. at 312-13.

14 Justice Harlan also dissented, famously, in Plessy. 163 U.S. at 552.

judicial branch that is called upon to protect minorities from the otherwise unchecked abuses of a potentially oppressive majority.15 "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for correspondingly more searching judicial inquiry." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Although the political rights of the United States citizens residing in Puerto Rico are at stake, the issue presented is not a "political question" any more than were the rights claimed in Brown. Cf. Marbury v. Madison, 5 U.S. 137 (1802) ("The province of the court is, solely, to decide on the rights of individuals . . . .").

Those born in Puerto Rico have since 1917 been born citizens of the United States. See Jones Act (Puerto Rico), Act of March 2, 1917, § 5, ch. 145, 39 Stat. 951 (1917); 8 U.S.C. § 1402. The right to vote is a fundamental right inherent in citizenship. Tashjian v. Republican Party, 479 U.S. 208, 217 (1986). It is fundamental because it is preservative of all other rights by adding the validating imprimatur of the ballot box to the business of government. Furthermore, it has been considered a fundamental right since at least 1886, see Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), and repeatedly thereafter in a variety of circumstances, see Bush v. Gore, 531 U.S. 98, 104 (2000); Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976); Lubin v. Panish, 415 U.S. 709, 721 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964), being variously described as "a right at the heart of our democracy," Burson v. Freeman, 504 U.S. 191, 198 (1992), and as being "too important in our free society to be stripped of judicial protection," Wesberry v. Sanders, 376 U.S. 1, 7 (1964). This is particularly relevant in the present circumstances since even under the notorious Insular Cases, the Constitution extends fundamental

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15 See John Stuart Mill, On Liberty 10 (Prometheus ed. 1986) ("'[T]he tyranny of the majority' is now generally included among the evils against which society requires to be on guard.").

rights to Puerto Rico. See Balzac, 258 U.S. at 312-13.

The indefinite disenfranchisement of the United States citizens residing in Puerto Rico constitutes a gross violation of their civil rights as guaranteed by the Fifth Amendment and by international treaties to which our Nation is a signatory. The Fifth Amendment is fully applicable to the actions of the U.S. Government in Puerto Rico. Cf. Examining Bd. of Eng'rs v. Flores, 446 U.S. 572 (1976). An equal protection component, similar to that in the Fourteenth Amendment, is part of the due process clause contained in the Fifth Amendment and serves as a constraint on the United States. Bolling v. Sharpe, 347 U.S. 497 (1954). The utter failure of the Government of the United States to protect its citizens in Puerto Rico from continued national disenfranchisement is a violation of due process.

It is also a violation of Article 21 of the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948) ("UDHR"), proclaimed by the member nations of the U.N. General Assembly shortly after World War II. The UDHR provides that:

> (1)Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> . . .
>
> (3) The will of the people shall be . . . expressed in periodic and genuine elections which shall be by universal and equal suffrage . . . .

Although the UDHR does "not of its own force impose obligations of international law," Sosa v. Alvarez-Machain, 125 S. Ct. 2739, 2767 (2004), it has been recognized for its "moral authority" by the Supreme Court. Id.16

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16 This Nation's highest court has referred to the provisions of the UDHR on several occasions since its adoption in 1948. See Knight v. Florida, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting) (noting U.N. Human Rights Committee decision that ten year delay between death sentence and execution not necessarily a violation of UDHR as informative precedent in Eighth Amendment case); Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (citing UDHR Article 25 as

The United States has committed itself to specific binding international obligations regarding the right to vote of all of its citizens. The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967), opened for signature Dec. 16, 1966 (entered into force Mar. 23, 1976) (ratified by the Senate April 12, 1992, 138 Cong. Rec. S-4781, S-4783) ("ICCPR"), to which the United States has been a party for the past twelve years, states in clear and unambiguous terms in Article 25 that "[e]very citizen shall have the right and opportunity . . . to vote . . . at genuine periodic elections which shall be by universal and equal suffrage . . . ." Furthermore, Article 2, Para. 1 states that each signatory "undertakes . . . to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . without distinction . . . ." Most importantly, in Paragraph 2, the signatory nations commit themselves that

> [w]here not already provided for by existing legislati[on], . . . each State Party . . . undertakes to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Additionally, in Paragraphs 3 (a) and (b), each State Party undertakes "[t]o ensure that any person whose [ICCPR] rights or freedoms . . . are violated shall have an effective remedy," to ensure that such rights are "determined by competent judicial,

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informative "on the issue of whether there is a 'right' to welfare assistance"); Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1965) (citing UDHR Article 13 in discussion of scope of due process); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963) (noting, in rejecting revocation of U.S. citizenship as consequence of remaining abroad to evade military service, the UDHR's guarantee "of the right of every citizen to retain a nationality"); Am. Fed'n of Labor, Ariz. State Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring) (citing UDHR provision on freedom from mandatory association in context of discussing foreign standards of labor law).

administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." Paragraph 3(c) makes clear that these remedies shall be enforced by the "competent authorities."

Those portions of the UDHR that rise to the level of customary international law, see Restatement (Third) of Foreign Relations Law of the United States, Pt. VII, introductory note (1987) ("[A]lmost all States would agree that some infringements of the human rights enumerated in the Declaration are violations of the [U.N.] Charter of customary international law."), in addition to the ICCPR and the obligations established thereunder, are the law of the land. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

The ICCPR was signed by the United States in 1976 and ratified thereafter by the Senate in 1992. See 138 Cong. Rec. S-4781, S-4783. Although the Senate added an Understanding that the ICCPR would not be self-executing, id., I cannot countenance that this Nation would have committed to the ICCPR by signature and ratification if compliance with the obligations enumerated therein was not contemplated. The duplicity and cynicism that would be implicit if such were the case would be a stain on our national honor and integrity of monstrous proportions. Because I refuse to believe that the United States would so act, I cannot but conclude that there is no legal excuse for continued non-compliance with these agreements.

Although there exists no individual cause of action to enforce the ICCPR in the instant case,17 I am nonetheless compelled to recognize that the United States is in violation of its obligation under Article 25 to afford universal suffrage to its citizens. See Restatement (Third) of Foreign Relations Law of the United States § 321 (1987) ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.").

The United States has taken some actions to meet some of its obligations both under domestic and international law to validate the right of all citizens to vote in national elections. The Constitution was thus amended in 1961 to allow citizens resident of the District of Columbia, (an unincorporated territory of the United States, as is Puerto Rico), to vote for the offices of President and Vice-President. U.S. Const. amend. XXIII. However, said citizens continue to be represented in Congress on an unequal footing with the U.S. citizens residing in the States, as are, of course, the United States citizens of Puerto Rico.

Furthermore, in 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff-1973ff-6, which allows United States citizens residing outside the United States to vote in federal elections as absentee voters in their

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17 Most courts to address the ICCPR have found that its non-self-executing nature precludes the existence of a private right of action to enforce its provisions. See, e.g., Igartúa I, 32 F.3d at 10 n.1; see also United States v. Duarte-Acero, 132 F. Supp. 2d 1036, 1040 n.8 (summarizing caselaw). Nevertheless, federal courts have found that provisions of the ICCPR can be enforced via the implementing legislation of the Alien Tort Claims Act. See Estate of Cabello v. Fernández-Larios, 157 F. Supp. 2d 1345, (S.D. Fla. 2001) (finding that plaintiff may bring claim under ATCA for violation of ICCPR Article 6 right to life); Ralk v. Lincoln County, Ga., 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) (finding plaintiff could bring claim under ATCA for violation of ICCPR) (relying on Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996)). Moreover, at least one court has determined that the individual rights guaranteed by the ICCPR may be raised defensively. Duarte-Acero, 132 F. Supp. 2d at 1040 n.8, aff'd, 296 F.3d 1277 (11th Cir. 2002) (recognizing defense, but determining that procedural requirements of ICCPR do not apply to United States action carried out on foreign territory).

last state of residence. But because the statute's definition of "United States" includes Puerto Rico, 42 U.S.C. §§ 1973ff-6(8), the residents of Puerto Rico who would otherwise qualify to vote pursuant to this statute are disqualified.

Since we decided Igartúa II in 2000, the United States has taken no action towards the national enfranchisement of its citizens in Puerto Rico or towards ending the present colonial relationship. This total inaction is particularly poignant at this moment in our history, when we seek to convince the inhabitants of far-flung places of the world of the democratic process and the validity of its expression through the ballot box.18 It is nothing short of ironic that close to 3,500 U.S. citizens from Puerto Rico support these goals by their presence in Iraq and Afghanistan as members of our Armed Forces, while they are themselves denied these rights particularly with regards to the election of their Commander in Chief. Their presence in these distant lands has not been without some cost.19

The total default by the United States of its constitutional and international obligations with respect to the citizens of the United States residing in Puerto Rico, release me from any obligation to give stare decisis recognition to our prior decisions in Igartúa I and Igartúa II. "Our Constitution . . . neither knows nor tolerates classes among citizens," Plessy, 163 U.S. at 559 (Harlan, J. dissenting), and yet what we have in this case is without a question the creation and perpetuation of a class of sub-standard, second-class citizens, with less rights than those enjoyed by the

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18 See David Roche & Carlotta Gall, Afghans Studying the Art of Voting, N.Y. Times, Oct. 4, 2004, at A1 (discussing challenges facing Afghanistan's first-ever democratic elections).

19 As of September 28, 2004, twenty U.S. citizens from Puerto Rico have died in Iraq, the 4th U.S. jurisdiction per capita. Twentieth Puerto Rican Soldier Killed in Iraq, The Associated Press State & Local Wire, Sept. 28, 2004. Two more have died in Afghanistan. Nearly 3,500 Puerto Ricans in Action in Afghanhistan, Iraq, Puerto Rico Herald, Nov. 21, 2003. Puerto Rico had the second highest per capita casualty rate in the Nation in the Korean Conflict and the twelfth in the Vietnam War. Nancy San Martin, A Military History, The Miami Herald, Jan. 21, 2004, available at 2004 WL 56367293.

main class of U.S. citizens.

Given the failure by the United States to take steps to rectify this clear violation of a fundamental right, I believe that the courts of the United States are required to take such extraordinary measures as are necessary to protect the discrete groups that are "completely under the sovereignty and dominion of the United States." Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (Marshall, C.J.); see Carolene Prods. Co, 304 U.S. at 152 n.4. The United States citizens residing in Puerto Rico are such a group.

Because the normal avenues of government are not open to the United States citizens who reside in Puerto Rico to end the limitless and unconstitutional (see Downes, 182 U.S. at 380 (Harlan, J. dissenting) colonial condition that deprives these citizens of the equality that should be inherent in United States citizenship, it becomes incumbent upon the judicial branch to take such extraordinary measures as are necessary and appropriate to protect the rights of this discreet and insular minority. As an initial remedy, I would reverse the judgment of the district court and remand for the entry of a declaratory judgment consistent with the views expressed by me and stating that the United States has failed to meet its obligations under Article 25 of the ICCPR. "This is of the very essence of judicial duty." Marbury, 5 U.S. at 178.

For the above reasons I respectfully dissent from the opinion of my brethren in the majority.

ANNEX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GREGORIO IGARTUA DE LA ROSA, et al.,	•	
Plaintiffs,	•	
v.	•	CIVIL NO. 03-1946 (RLA)
UNITED STATES OF AMERICA,	•	
Defendant.	•	

ORDER DISMISSING THE COMPLAINT

This is the third action spearheaded by plaintiff GREGORIO IGARTUA DE LA ROSA within the past decade seeking to enfranchise U.S. citizens residents of Puerto Rico with the right to vote for the U.S. President and Vice President.[1] Plaintiffs consist of lifetime residents of Puerto Rico and individuals previously qualified to vote in the presidential elections by virtue of their residency in a state but lost that right upon moving to Puerto Rico. Plaintiffs claim that their inability to vote in presidential elections violates their constitutional rights and also runs contrary to international obligations of the United States. Additionally, the complaint challenges the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C §§ 1973ff to 1973ff-6.

Defendant has moved the court for dismissal of the complaint inter alios on stare decisis grounds.

PROCEDURAL BACKGROUND

The Presidential vote issue was first addressed in our

[1] See Gregorio Igartua de la Rosa v. United Status, 32 F.3d 8 (1st Cir. 1994), cert. Den. 514 U.S. 1049 (1995) ("Igartua I"), and Igartua de la Rosa v. United Status, 229 F.3d 80 (1st Cir. 2000) ("Igartua II").

Circuit in Igartua I. The Court of Appeals' ruling in the Igartua I case was straightforward. "[T]he Constitution does not grant citizens the right to vote directly for the President." 32 F.3d at 9. The President is selected instead by electors who are chosen by a mechanism devised by each State legislature. Thus, pursuant to the U.S. Constitution "'[t]he right to vote in presidential elections under Article II inheres not in citizens but in states'". Id. at 10 (citing Attorney Gen. of Guam on behalf of All U.S. Citizens Residing in Guam, etc. v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984)) cert. den. 469 U.S. 1209, 105 S.Ct. 1174, 84 L.Ed.2d 323 (1985).

The court further noted that the only non-state jurisdiction granted the authority to participate in the presidential elections is the District of Columbia which gained the right by an amendment to the Constitution. Because Puerto Rico is not a state, enfranchisement is not viable absent a change in political status or a constitutional amendment to that effect. Igartua I, 32 F.3d at 10.

Plaintiffs' argument that the International Covenant of Civil and Political Rights ("ICCPR") served as a basis for the right to vote for the president was also rejected by the court. Id. n.1

Lastly, the court specifically ruled against plaintiffs' argument that the provisions of the UOCAVA precluding U.S. citizens moving to Puerto Rico - as opposed to outside the United States - from voting in their prior state of residence were unconstitutional.

In Igartua II the court of appeals reversed the lower court's finding that U.S. citizens residing in Puerto Rico had the right to vote in the presidential elections. The reversal was premised on stare decisis principles. According to the opinion, "[b]ecause Igartua I is binding authority, the district court erred in not dismissing the action." Igartua II, 229 F.3d at 85.

STARE DECISIS

In its motion to dismiss defendant points to Igartua I and Igartua II as valid stare decisis precedent justifying dismissal of this suit. Plaintiffs oppose arguing that "new reasons and change in circumstances... justify this Court to grant the relief requested in the complaint, thus the legal basis in the case is different." Opposition (docket No. 5) p. 2.

Stare decisis is an abridged version of the Latin phrase stare decisis et non quieta movere which means "[t]o stand by things decided, and not to disturb settled points." Black's Law Dictionary 1414 (7th ed. 1999). It relates to the court's practice of following binding precedent. Ordinarily courts will stand committed to follow prior rulings rendered either by that same court or courts to which it owes hierarchical obedience. "[T]he principle of stare decisis the doctrine that 'renders the ruling of law in a case binding in future cases before the same court or other courts owing obedience to the decision,' is an integral component of our jurisprudence." Stewart v. Dutra Const. Co., 230 F.3d 461, 467 (1st Cir. 2000) (citing Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993)); Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico, 270 F.3d 17, 22 (1st Cir. 2001); Igartua II, 229 F.3d at 84. See also, Carpenters Local Union No. 26 v. United States Fid. & Guar. Co., 215 F.3d 136, 141 (1st Cir. 2000) ("the principle of stare decisis forms an integral part of our system of justice.... that system is not only precedent based but also hierarchical.")

Through stare decisis the courts ensure "finality, stability, and certainty in the law". Carpenters Local Union, 215 F.3d at 142; Arecibo Cmty. Health Care, 270 F.3d at 22; Stewart v. Dutra, 230 F.3d at 467. "But stare decisis is neither a straightjacket nor an immutable rule; it leaves room for courts to balance their respect for precedent against insights gleaned from new developments, and to make informed judgments as to whether earlier decisions retain preclusive force." Carpenters Local Union, 215 F.3d at 142.

Given the significant role it plays in the judicial system, "[a] departure from stare decisis must therefore be supported by some 'special justification.'". Arecibo Cmty. Health Care, 270 F.3d at 22 (citing Dickerson v. United States, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)). See also. Stewart v. Dutra, 230 F.3d 467 ("a departure from a court's own precedent, in the teeth of the principle of stare decisis, must be supported by some 'special justification.'")

In Williams v. Ashland Eng'g Co., Inc, 45 F.3d 588, 592 (1st Cir. 1995) the First Circuit Court of Appeals identified two situations which would prove adequate for courts to deviate from prior precedent. These are: when stare decisis is undermined by

"controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling... [or in] those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." This reasoning has been consistently followed in subsequent appellate opinions. See, Arecibo Cmty. Health Care, 270 F.3d at 23; Stewart v. Dutra, 230 F.3d at 467; Igartua II, 229 F.3d at 84.

Plaintiffs passionately argue that recent jurisprudence as well as new legislation and international obligations confirm their arguments that "the basis for the vote in Presidential elections is citizenship"[2] and that the right to vote is a fundamental right which cannot be denied to U.S. citizens.

Plaintiffs cite Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) for the proposition that "the basis for the right to vote in federal elections is American citizenship."[3] This statement, however, has been taken out of context. In that case the per curiam Court specifically noted that under the current constitutional framework state legislatures have complete control over the manner in which the members of the electoral college, i.e., those actually voting for the President, will be selected. State legislatures may choose the electors themselves or allow the individual voters to do so. Because the right lies with them legislatures may even switch the selection system at will.

> The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. U.S. Const., Art. II, § 1. This is the source for the statement in McPherson v. Blacker, 146 U.S. 1, 35, 36 L.Ed. 869, 13 S.Ct. 3 (1892), that the state legislature's power to select the manner for appointing electors is plenary; it may if it so choose, select the electors itself, which

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[2] Opposition (docket NO. 5) pp. 2-3.

[3] Opposition (docket No. 5) p. 16.

> indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution... History has now favored the voter, in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.

Bush v. Gore, 531 U.S. at 104, 121 S.Ct. 525, 148 L.Ed.2d 388.

Hence, there is no new jurisprudence warranting departure from prior clear, applicable precedent. Nor is there new legislation cited by plaintiffs in their opposition which would require the court to disregard Igartua I and Igartua II.[4]

Plaintiffs refer to the obligations of the United States under the ICCPR, the U.N. Declaration of Human rights, and the OAS Democratic Charter as additional basis for extending the right to vote to Puerto Rico residents. This argument also fails. In discussing the import of the ICCPR on the right to vote in the presidential election the Igartua I court specifically noted that even assuming that it provided for "privately enforceable rights" it could not "override the constitutional limits" imposed by Art. II. Id., 32 F.3d at 10 n.1. Likewise, rights and duties found in any other international obligations listed by plaintiffs as adopted by the United States - even if we were to assume them to be self-executing - cannot run contrary to an express constitutional mandate. In other words, the Constitution trumps inconsistent

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[4] Plaintiffs cite The National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-10, and the Help America Vote Act of 2002, 42 U.S.C. §§ 15301 to 15306 as grounds for their argument that federal legislation establishes citizenship as the basis for voting in federal elections. We find, however, that references in these statutes to the right to vote do not bestow the electoral vote upon the residents of Puerto Rico.

provisions.

The constitutionality of the UOCAVA has already been determined in Igartua I, 32 F.3d at 10 and we find no reason to revisit this matter.[5]

THE PUERTO RICAN DILEMMA

The following comments do not constitute a holding of this court. However, because of the nature of this case the writer finds it incumbent to emit a monitory to plaintiff, Gregorio Igartua de la Rosa.[6]

The Igartua I and Igartua II cases were based on essentially similar claims. Accordingly, the Circuit court of Appeals dismissed Igartua II on stare decisis. Today this court will dismiss plaintiff's complaint once again on the grounds of stare decisis. In all likelihood, this case will be designated Igartua III. The purpose of this monitory is not to dampen the ardor of an obvious crusader who, undoubtedly, is sincerely following his quest in addressing a very serious issue which this writer does not take lightly. Indeed, other judges, district and appellate, in this and other circuits have demonstrated concern over the anomaly presented because of the "peculiar structure"[7] of the constitutional dictates relating to the election of the President resulting in U.S. citizens residing in Puerto Rico being unable to vote in a presidential election.[8] This is particularly poignant when one

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[5] A similar constitutional attack on the UOCAVA provisions brought by a former resident of New York who relocated to Puerto Rico was also rejected in Romeu v. Cohen, 265 F.3d 118 (2nd Cir. 2001).

[6] MR. IGARTUA DE LA ROSA appears as both lead plaintiff and counsel.

[7] Romeu v. Cohen, 265 F.3d at 128 (Laval, J.)

[8] "The United States citizens residing in Puerto Rico are caught in an untenable Catch-22. The national disenfranchisement of these citizens ensures that they will never be able, through the political processes, to rectify the denial of their civil rights in those very political processes." Igartua II, 229 F.3d at 80 (Torruella, J.).

"Furthermore, there is no question that the residents of Puerto Rico suffer the consequences of 'the inferior nature of the United States citizenship' they hold." United States v. Santana, 184 F.Supp.2d 131, 139 (D.P.R. 2001) (Dominguez, J.) (citing Igartua II, 229 F.3d at 86).

"[T]here is little doubt that all American citizens living in Puerto

considers the fact that thousands of residents of Puerto Rico serve - and many have died - in the armed forces of the United States on an equal footing with their stateside "compatriots" sans the vote for their Commander-in- Chief, the President of the United States.

Equally acidulous are the noble pronouncements written into treaty obligations assumed by the United States such as the ICCPR[9] which employs the following aspiring language: "Every citizen shall have the right... to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage"[10] and "[a]ll persons are equal before the law".[11] Obviously, these noble utterances about the rights of all citizens before the law sits ill at ease with the notion that there is an exception to that right if one is a resident of Puerto Rico. This state of affairs has even prompted one judge to observe, ex-curia, that: "In addition, this exclusion [from the presidential vote] fuels annual attacks on the United States in hearings in the United Nations, at which the United States is descried as hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home."[12] As previously intimated, the anomaly has not gone unnoticed, neither by this nor other courts. However, as Justice Oliver Wendell Holmes, Jr. so famously said: "The life of the law is not logic, it has been experience."[13] I can only assume that, in this case, "experience" means that in the various plebiscites to date the citizens of Puerto Rico have yet to

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Rico are suffering a grave injustice. As American citizens, they should be allowed to vote for their national leader." Romeu v. Cohen, 121 F.Supp.2d 264, 285 (S.D.N.Y. 2000) (Scheindlin, J.)

"Still, despite paying for their citizenship with blood, U.S. citizens residing in Puerto Rico have not entered the Presidential ballot box. It is inconceivable to our constitutional order to expect that the government can place our nation's sons and daughters in harm's way and not recognize the power of those individuals to have a say in electing those who will make that decision." Igartua de la Rosa v. United States, 107 F.Supp.2d 140, 145 (D.P.R. 2000) (Pieras, J.

[9] I.L.M. 368 (1967) (entered into force Sept. 8, 1992).

[10] Art. 25 (italics added).

[11] Art. 26 (italics added)

[12] Romeu v. Cohen, 265 F.3d at 127-8 (Laval, J.)

[13] "The Common Law" (1981).

resolve this anomaly themselves. Contrary to what some may passionately desire, it is not the function of this court to make future plebiscites irrelevant. As this court has previously held, it is a political matter to be resolved in other forums.[14]

To sum up, the court understands and sympathizes with Mr. Igartua de la Rosa's arguments. Nevertheless, the Court of Appeals' ruling in the Igartua II case was unequivocal and unambiguous and this court is bound to it. Subsequent to the Court of Appeals issuing its decision none of the requisite conditions listed by the Court as necessary to extend the vote to Puerto Rico residents have been met. From a judicial point of view we sit in the exact same place the Court of Appeals sat in Igartua II and are compelled to make the same remarks it made to counsel.

Since our decision in Igartua I in 1994, Puerto Rico has not become a State, nor has the United States amended the Constitution to allow United States citizens residing in Puerto Rico to vote for President... Absent such a change in the status of Puerto Rico or an amendment to the Constitution of the United States, our decision in Igartua

I controls this case, unless there has been intervening controlling or compelling authority.

Igartua II, 229 F.3d at 84.

We find that plaintiffs' arguments - albeit disturbing - do not constitute a "special justification" and are therefore, not legally sufficient to allow us to depart from clear and applicable precedent.

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[14] Igartua v. United States, 842 F.Supp. 607 (D.P.R. 1994), aff'd Igartua I. See also, Romeu v. Cohen, 121 F.Supp.2d 264.

CONCLUSION

Defendant's Motion to Dismiss (docket No. 3)[15] is **GRANTED** and the complaint filed in this case is hereby DISMISSED on stare decisis grounds.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 19th day of August, 2004.

S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

---

[15] See also, Plaintiffs' Motion in Opposition (docket No. 5); Reply Motion (docket No. 7); Motion Filing Supporting Evidence to the Complaint (docket No. 12), and Motion Filing Supporting Evidence to the Complaint (docket No. 13).

Defendant's Statement Concerning Filing of a Reply Brief (docket No. 6) is **NOTED.**

ANNEX E

PARTIDO REPUBLICANO
REPUBLICAN PARTY

Comprometidos con:
Presidential Electors with:

1 George W. Bush
Presidente de los Estados Unidos
President of the United States

2 Dick Cheney
Vicepresidente de los Estados Unidos
Vice-president of the United States

PARTIDO DEMOCRATA
DEMOCRATIC PARTY

Comprometidos con:
Presidential Electors with:

1 Al Gore
Presidente de los Estados Unidos
President of the United States

2 Joe Lieberman
Vicepresidente de los Estados Unidos
Vice-president of the United States

PAPELETA PRESIDENCIAL
PRESIDENTIAL BALLOT

INSTRUCCIONES SOBRE LA FORMA DE VOTAR:
Un solo papeleta usted tiene derecho a votar por el candidato a Presidente y el candidato a Vicepresidente de un mismo partido político

INSTRUCTIONS TO VOTE
On this ballot you vote for the candidates to President and Vice-president of the same party

COMO VOTAR
Para votar, usted tiene una sola marca (X) solida en el espacio en blanco bajo la insignia del partido político de su preferencia y no debe colocar otra marca en la papeleta

HOW TO VOTE
To vote you must put one (X) on the blank below the party of your choice

ELECCIONES GENERALES
PAPELETA ELECTORAL PRESIDENCIAL

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ANNEX F

AMERICAN CITIZENS RESIDENTS OF PUERTO RICO WHO DIED IN SERVICE TO THEIR NATION DEFENDING THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS OF THE CITIZENS OF IRAK AND AFGHANISTAN, WHILE BEING DENIED AT HOME THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS, FOR THEIR COMMANDER IN CHIEF.

(PARTIAL LIST)

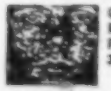
Puertorriqueños caídos en Afganistán e Irak

Antonio Sledd Figueroa, 21

Tampa, Florida
Muerto por fuego enemigo el 8 de octubre de 2002 en Kuwait.

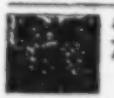
Robert Marcus Rodríguez, 21

Queens, Nueva York
Muerto en acción el 27 de marzo del 2003, al lado del Río Eufrates, cerca de Nasiriya



Orlando Morales Rivera, 33

Orocovis, P.R.
Muerto en una emboscada en Afganistán 29 de marzo de 2003

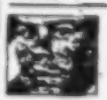


Andrew Julián Avilés, 19

Murió el 7 de abril del 2003, en el centro de Irak, cuando artillería enemiga alcanzó el camión donde era transportado.

Ramón Reyes Torres, 29

Caguas, Puerto Rico
Murió cuando trató de proteger a un carro bomba en Bagdad, Irak, el 16 de julio de 2003



Juan M. Serrano, 31

Manatí, Puerto Rico
Murió cuando un Humvee le cayó encima en Bagdad, Irak, el 24 de julio de 2003

José Pérez, 23

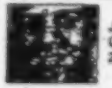
Río Grande, Puerto Rico
Murió cuando su helicóptero, CH-47 Chinook, se estrelló cerca de Irak, el 2 de noviembre de 2003

Ernesto M. Blanco Caldas, 28

Texas
Murió a causa de un explosivo al noreste de Fallujo, Irak, el 28 de diciembre de 2003

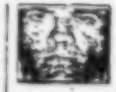
Alexis Soto Ramírez, (?)

Santa Isabela, Puerto Rico
Murió el 12 de diciembre en el Walter Reed Medical Center.



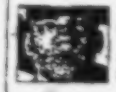
Jocelyn L. Carrasquillo, 28

Carolina del Norte
Murió en Irak el 13 de marzo de 2004



Melvin Mora Flores, 27

Arecibo, Puerto Rico
Murió tras un ataque enemigo en Taji, Irak, 26 de junio del 2004



Spc Jacob D. Martín-Gutiérrez 21

Norwich, Connecticut
Murió en la ciudad de Sadr, Irak,el 18 de agosto de 2004

Staff Sgt. Gary A. Valliant, 41

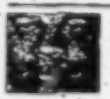
Trujillo Alto, Puerto Rico
Murió cuando su tanque pisó una mina en Khaldiya, Irak, el 5 de septiembre de 2004

Spc. Jose A. Rivera-Serrano 28

Mayagüez, Puerto Rico
Murió en Bagdad, Irak, el 27 de diciembre del 2004

Pedro A. Muñoz Yambó, 47

Quebradillas, Puerto Rico
El 2 de enero de 2005 resultó herido de muerte en un tiroteo cuando su patrulla cayó bajo fuego enemigo en una villa cerca al campo aéreo Shindand en la provincia de Herat.



Sgt Carlos J. Gil,— 30

Orlando, Florida
Murió cerca de Humaniyah, en Irak, el 18 de febrero del 2005

MSG Edwin A. Matos Colón, 42

Carolina, P.R.
Murió en un accidente ocasionado por un mal tiempo en su helicóptero el 6 de abril de 2005

CW2 David Ayala, 24

Nueva York
Murió en un accidente ocasionado por el mal tiempo en su helicóptero el 6 de abril de 2005

SPC Alaina Ramírez González, 23

Hormigueros, Puerto Rico
Murió en Tikrit, Irak, el 15 de abril de 2005

Maj. Ricardo A. Crocker García, 39

California
Murió cuando una granada explotó cerca de su batallón en Hadiha, Irak el 28 de mayo de 2004

Gil Mercado Román, 24
Paterson, New Jersey (Sin Posibles, Isabela)
Murió el 13 abril de 2003 por una descarga de arma en Irak
Kelvin Feliciano Gutierrez, 21
Afuaco, Puerto Rico
Murió en un accidente en su vehículo militar en Afganistán en junio de 2003
Richard P. Ortega, 30
Toa Alta, Puerto Rico
Francisco Benitez, 20
Fort Buchanan, Puerto Rico
Murió cuando su helicóptero, CH-47 Chinook, se estrelló cerca de Irak, Fallujah el 2 de noviembre de 2003
Francisco Martinez, 28
Humacao, Puerto Rico
Murió el 4 de noviembre de 2004, por unas explosiones en Bagdad
José Rivera, 34
Fernando A. Méndez Acevedo, 27
Ponce, Puerto Rico
Murió cuando insurgentes atacaron su base en Ramadi, Irak, el 6 de abril de 2004
Spc Isaac Michael Nieves, 20
Nueva York
Carlos M. Camacho Rivera, 24
Spc. Michael A. Martínez 29
Juana Díaz, Puerto Rico
Murió en su vehículo militar en Baquba, Irak, el 8 de septiembre del 2004
Lance Cpl Ramón Matos, 20
New York
Murió por fuego enemigo en Al Anbar Province, Irak, el 14 de septiembre del 2004
Staff Sgt. Henry E. Irizarry, 38
Spc. Francisco G. Martínez, 20
Spc Lizbeth Robles31
Vega Baja, Puerto Rico
Murió en el 228th Command Support Hospital en Tikrit, Irak, el 1ro de marzo de 2005
Sgt Julio E. Negrón, 26
Pompano Beach, Florida
Murió en un accidente en Bayji, Irak, el 28 de febrero de 2005
Sgt. Miguel A. Ramos, 38
Maya@az, Puerto Rico
Murió tras ser impactado por un misil enemigo en Bagdad, Irak, el 31 de mayo de 2005
PFC Emmanuel Hernández, 22
Yauco, Puerto Rico
Murió en un ataque enemigo en Sinkir, Afganistán. Murió en un hospital 4 horas después
1LT Carlos J. Díaz, 27
Yauco, Puerto Rico
Murió cuando fuerzas enemigas detonaron un artefacto cerca de Baquba, Irak, el 23 de agosto de 2005

(2)

Supreme Court, U.S.
FILED
FEB 6 - 2006
OFFICE OF THE CLERK

No. 05-650

In the Supreme Court of the United States

GREGORIO IGARTUA DE LA ROSA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Constitution or international instruments entitle United States citizens residing in Puerto Rico to vote in presidential elections.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-81a) is reported at 417 F.3d 145. The panel opinion of the court of appeals (Pet. App. 88a-101a) is reported at 386 F.3d 313. The opinion of the district court (Pet. App. 102a-110a) is reported at 331 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2005. The petition for a writ of certiorari was filed on October 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are United States citizens residing in the Commonwealth of Puerto Rico, who desire to vote in

elections for the President and Vice President of the United States. This is the third action brought within the last 12 years in which citizens of Puerto Rico, led by pro se plaintiff and counsel Gregorio Igartua de la Rosa, contend that the United States Constitution and international agreements entitle citizens of Puerto Rico to vote in presidential elections.

a. In *Igartua de la Rosa* v. *United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam) (*Igartua I*), cert. denied, 514 U.S. 1049 (1995), a group of citizens residing in Puerto Rico—including two of the petitioners in the instant case—brought an action asserting that the Constitution and various international instruments afforded them the right to participate in presidential elections. The court of appeals "summarily" rejected the contention that the "inability to vote in the United States presidential election violates their constitutional rights." 32 F.3d at 9. As the court explained, the Constitution itself expressly "provides that the President is to be chosen by electors who, in turn, are chosen by '*each state* . . . in such manner as the Legislature thereof may direct.'" *Ibid.* (quoting U.S. Const. Art. II, § 1, Cl. 2 (emphasis and ellipses added in *Igartua I*)). Accordingly, "the Constitution does not grant citizens the right to vote directly for the President," and "only citizens residing in *states* can vote for electors and thereby indirectly for the President." *Ibid.* Because Puerto Rico is not a State, the court held, "it is not entitled under Article II to choose electors for President, and residents of Puerto Rico have no constitutional right to participate in that election." *Id.* at 9-10.

The *Igartua I* court further explained that no constitutional amendment provides for citizens of Puerto Rico to vote in a presidential election. Instead, "[t]he only jurisdiction, not a state, which participates in the presi-

dential election is the District of Columbia, which obtained the right through the twenty-third amendment to the Constitution." 32 F.3d at 10. Accordingly, "[o]nly a similar constitutional amendment or a grant of statehood to Puerto Rico" could provide its citizens "the right to vote in the presidential election." *Ibid.*

Finally, the court of appeals held that the International Covenant on Civil and Political Rights (ICCPR) does not entitle citizens of Puerto Rico to vote in presidential elections. As the Court explained, the substantive provisions of the ICCPR "were not self-executing * * * and could not therefore give rise to privately enforceable rights under United States law" and, in any event, the ICCPR could not "override the constitutional limits" set forth in Article II. *Iguarta I*, 32 F.3d at 10 n.1.

b. In 2000, another group of citizens residing in Puerto Rico—including four of the petitioners in the instant case—filed a second action alleging that the Constitution and the ICCPR entitle citizens of Puerto Rico to vote in presidential elections. In *Igartua de la Rosa* v. *United States*, 229 F.3d 80 (1st Cir. 2000) (per curiam) (*Igartua II*), the court of appeals once again rejected those contentions. The court explained that *Igartua I* had "held with undeniable clarity that the Constitution of the United States does not confer upon United States citizens residing in Puerto Rico a right to participate in the national election for President and Vice-President." *Id.* at 83. The court further explained that, under settled principles of stare decisis, "our decision in *Igartua I* controls this case, unless there has been intervening controlling or compelling authority." *Id.* at 84. The court concluded that no post-1994 decisions had undercut *Igartua I*, and it therefore applied that "binding au-

thority" to order the dismissal of *Igartua II*. See *id.* at 84-85.

Judge Torruella joined the per curiam opinion in *Igartua II*, but also filed a separate concurrence. The concurrence urged at some length that disparate treatment of citizens of Puerto Rico was unfair and could warrant "judicial intervention at some point." 229 F.3d at 89 (concurring opinion); see *id.* at 85-90. Nonetheless, the concurring opinion concluded that *Igartua II* was not an "appropriate case for such intervention, largely because the particular issue of the presidential vote is governed by explicit language in the Constitution providing for the election of the President and Vice-President *by the States*, rather than by individual citizens." *Id.* at 90.

2. Undaunted by *Igartua I* and *Igartua II*, Mr. Igartua de la Rosa and others filed a third, essentially identical lawsuit in August 2003. As in the previous cases, petitioners alleged that citizens of Puerto Rico have a right to vote in presidential elections under the Constitution (C.A. App. 1, 15-17, 50-51) and under international instruments such as the ICCPR (*id.* at 34-40).

The district court dismissed the complaint for failure to state a claim. With respect to the constitutional claims, the court found "no new jurisprudence warranting departure from prior clear, applicable precedent. Nor is there new legislation * * * which would require the court to disregard *Igartua I* and *Igartua II*." Pet. App. 106a. The court similarly found dispositive the previous holding in *Igartua I* that treaties or other international agreements, even if privately enforceable, "could not 'override the constitutional limits' imposed by Art. II" of the Constitution. *Ibid.* (quoting 32 F.3d at 10 n.1).

3. a. On appeal, a panel of the court of appeals affirmed. Pet. App. 88a-90a. The majority held that the prior decisions in *Igartua I* and *Igartua II* controlled, and that petitioners had not raised any arguments that warranted departure from the rule that earlier decisions are binding.

Judge Torruella dissented. Pet. App. 91a-101a. Complaining of the "colonial nature of the U.S.-Puerto Rico relationship" and of the "doctrine of inequality" created by past Supreme Court decisions (*id.* at 93a-94a), the dissent asserted that "[t]he indefinite disenfranchisement of the United States citizens residing in Puerto Rico constitutes a gross violation of their civil rights as guaranteed by the Fifth Amendment and by international treaties to which our Nation is a signatory." *Id.* at 96a.

b. The court of appeals' panel thereafter granted rehearing, ordering the parties to submit supplemental briefs addressing two questions: (1) the effect of "treaty obligations" of the United States on the eligibility of citizens residing in Puerto Rico to vote for President and Vice-President of the United States; and (2) the availability of relief under the Declaratory Judgment Act, 28 U.S.C. 2201. See Pet. App. 82a-83a. Prior to re-argument before the panel, however, the full court of appeals voted to hear the case en banc. *Ibid.*

4. a. The en banc court of appeals affirmed the dismissal of petitioners' complaint. Pet. App. 1a-11a. The court noted that the constitutional claim is "readily answered" by the text of the Constitution itself, which vests the election of the President and Vice President in the States rather than the citizens. *Id.* at 3a. The court concluded: "Like each state's entitlement to two Senators regardless of population, the make-up of the elec-

toral college is a direct consequence of how the framers of the Constitution chose to structure our government—a choice itself based on political compromise rather than conceptual perfection." *Id.* at 4a. Thus, vesting the franchise in States rather than citizens "cannot be 'unconstitutional' because it is what the Constitution itself provides." *Ibid.* Noting that petitioners' constitutional claim had been rejected three times by the court of appeals, the court stated: "In this en banc decision, we now put this constitutional claim fully at rest: it not only is unsupported by the Constitution but is contrary to its provisions." *Id.* at 5a.

The en banc court of appeals also held that petitioners' reliance upon three international instruments - the ICCPR, the Universal Declaration of Human Rights, and the Inter-American Democratic Charter—did not warrant relief. The court observed that "[n]o treaty claim, even if entertained, would permit a court to order the electoral college to be enlarged or reapportioned," since "neither a statute nor a treaty can override the Constitution." Pet. App. 5a-6a.

The court of appeals also rejected petitioners' efforts to recast the claim as one seeking declaratory (rather than injunctive) relief, identifying "a host of problems with the treaty claim, including personal standing, redressability, the existence of a cause of action, and the merits of the treaty interpretations offered." Pet. App. 6a. The court found it "unnecessary to plumb these questions, * * * because none of these treaties comprises domestic law of the United States and so their *status* furnishes the clearest ground for denying declaratory relief." *Id.* at 7a. The court held that the international instruments cited by petitioners "do not adopt any legal obligations binding as a matter of domestic law,"

noting that the Universal Declaration and the Inter-American Democratic Charter are merely "precatory," and the ICCPR is not self-executing. *Id.* at 8a-9a. To declare that the United States was in violation of these provisions "would attempt to do what the President and Congress have declined to do, namely, to deploy the treaty provision in an attempt to order domestic arrangements within the United States." *Id.* at 9a.

Finally, the court of appeals rejected the contention that "customary international law" requires a declaration concerning the right of Puerto Rico residents to vote in presidential elections. Noting the different methods by which democratic nations choose their leaders, the court concluded: "If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law." Pet. App. 11a.

b. Judge Lipez concurred in the judgment. Pet. App. 13a-22a. The concurring opinion would not have reached the merits of petitioners' claim for declaratory relief, concluding that the court lacked jurisdiction over the claim because it is not redressable by the court. *Id.* at 13a-14a. The concurring opinion explained that "there is only hope and speculation that Congress, in response to a declaratory judgment about a violation of international law, would invoke cumbersome and contentious processes relating to Constitutional amendment or the admission of a new state to eventually give citizen residents of Puerto Rico the right to vote for President and Vice President. Such hope and speculation does not satisfy the 'case or controversy' requirement of Article III." *Id.* at 22a.

c. Judge Campbell issued a short concurring opinion (Pet. App. 12a) agreeing with the concurrence of Judge

Lipez that the court lacked jurisdiction to grant declaratory relief. He also agreed with the majority's "alternative analysis which leads to the same outcome." *Ibid.*

d. Judge Torruella dissented. Pet. App. 23a-66a. In a lengthy opinion recounting the political and legal history of Puerto Rico, Judge Torruella asserted that the right to vote is fundamental and that, even if international legal instruments are not self-executing and do not create private rights, the court should enter a declaratory judgment stating that the United States has not taken any steps to comply with those international instruments. See *id.* at 25a-66a.

e. Judge Howard also dissented. Pet. App. 66a-81a. He asserted that the case should be remanded to permit the parties to develop a record concerning whether the ICCPR is self-executing. *Id.* at 80a-81a.

ARGUMENT

The court of appeals held that the Constitution does not confer upon U.S. citizens residing in Puerto Rico the right to participate in presidential elections and that the courts lack the authority to enter a declaratory judgment stating that the United States has violated various international instruments in failing to provide for such a right. That decision is amply supported by constitutional text, unbroken tradition, and uniform precedent. Moreover, the court of appeals' decision does not create a conflict in the circuits. Accordingly, review by this Court is unwarranted.

1. a. The Constitution expressly provides for the President to be elected through a vote of presidential electors chosen by the States. In pertinent part, Article II states: "Each *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Elec-

tors, equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress." Art. II, § 1, Cl. 2 (emphases added). Moreover, the Twelfth Amendment provides for the electors to vote for President "in their respective *states*" and further provides that, if no candidate receives a majority of votes of the presidential electors, the House of Representatives is to elect the President in a vote "taken by *states*, the representation from each *state* having one vote" (emphases added). These provisions make unambiguously clear that only the States (and, derivatively, the citizens of States) may participate in presidential elections.

The Twenty-third Amendment reinforces this understanding. That Amendment permits the District of Columbia to appoint presidential electors, and it specifies that the number of such electors shall be "equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*, but in no event more than the least populous State" (emphasis added). The Amendment obviously presupposes that, because the District of Columbia is not a State, it could not have participated in the presidential election absent a constitutional amendment.

The Constitution also expressly distinguishes between States and territories, the latter of which are nowhere mentioned in the clauses addressing presidential elections, but which are addressed in a separate clause providing that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." Art. IV, § 3, Cl. 2. Moreover, when the Twelfth Amendment was ratified in 1804, United States "Territory" (outside of any State) included the

Indiana Territory, the Mississippi Territory, and the Louisiana Territory. Nonetheless, the Amendment confirmed that only States would appoint presidential electors, after Congress specifically rejected an alternative amendment that would have provided for the presidential electors to be chosen by a nationwide popular vote. See *McPherson* v. *Blacker*, 146 U.S. 1, 33-34 (1892).

The understanding that States, but not territories, would participate in presidential elections has remained uniform throughout American history. To pick but a few examples: the Indiana Territory and the Louisiana Territory did not participate in presidential elections either before or after ratification of the Twelfth Amendment; Alaska and Hawaii did not participate in presidential elections before achieving statehood in 1959; the District of Columbia did not participate in presidential elections before ratification of the Twenty-third Amendment in 1961; and territories within the meaning of the Constitution, such as Puerto Rico (see *Harris* v. *Rosario*, 446 U.S. 651 (1980)), Guam, and the Virgin Islands, to this day do not participate in presidential elections. This Court has held that "'traditional ways of conducting government * * * give meaning' to the Constitution," *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (citation omitted), particularly where the practice at issue has spanned the entirety of American history. See, *e.g.*, *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936). That principle clearly applies here, where no territory has ever participated in any of the 54 presiden-

tial elections conducted over more than two centuries of American history.[1]

b. Petitioner's fundamental premise—that the right to vote in presidential elections accrues as a right of United States citizenship (Pet. 11)—is incorrect. In fact, this Court has recognized that the right to appoint presidential electors is constitutionally vested in the States. See, *e.g.*, *Bush* v. *Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 n.18 (1983) ("The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors."); *McPherson*, 146 U.S. at 35 ("the appointment and mode of appointment of electors belong exclusively to the States under the Constitution"); *In re Green*, 134

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[1] Petitioner argues (Pet. 10) that Ohio has participated in presidential elections since 1803 even though it was "not formally admitted as a state until 1953" due to a technical error. However, the courts have uniformly rejected the contention that Ohio was not properly admitted as a State in 1803. See, *e.g.*, *Knoblauch* v. *Commissioner*, 749 F.2d 200, 201-202 (5th Cir. 1984) (collecting cases), cert. denied, 474 U.S. 830 (1985); *State* v. *Bob Manashian Painting*, 782 N.E.2d 701, 704 (Ohio Mun. Ct. 2002) ("Litigants in other courts have argued that Ohio is not a state, or that it was never properly admitted to the Union. These assertions are entirely groundless.") (collecting cases); see also *Bowman* v. *Government of the U.S.*, 920 F. Supp. 623, 625 n.4 (E.D. Pa. 1995) (concluding that the 1953 presidential declaration of Ohio's statehood was "purely ceremonial"). This Court recognized long ago that Ohio was "admitted to the Union in 1802, under an act of Congress." *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 160 (1886); see also *Piqua Branch of the State Bank* v. *Knoop*, 57 U.S. (16 How.) 369, 384 (1854) (discussing Ohio Enabling Act).

U.S. 377, 379 (1890) (referring to "the vote of the State for President and Vice-President of the nation"); see also *Romeu* v. *Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) ("the Constitution does not directly confer on any citizens the right to vote in a presidential election."); *In re Opinion of the Justices*, 107 A. 705, 706 (Me. 1919) ("The language of section 1, subd. 2, is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states.").

Petitioners nevertheless contend (Pet. 10) that the specific constitutional provisions governing presidential elections must be considered in conjunction with other constitutional provisions governing voting rights, such as the First, Fourteenth, and Fifteenth Amendments. But whatever the source and scope of the right to vote in other contexts, there is simply no individual constitutional right to vote for President of the United States. For instance, this Court made clear in *Bush* v. *Gore* that equal protection constraints attach only *after* a "state legislature vests the right to vote for President in its people," and the Court stressed that "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors." 531 U.S. at 104. In *McPherson*, the Court noted that "[t]he constitution does not provide that the appointment of electors shall be by popular vote" (146 U.S. at 27), and it specifically rejected a contention that a popular vote for the President is required by the Fourteenth and Fifteenth Amendments, including the Equal Protection Clause (see *id.* at 38-40).

Nor do due process or equal protection principles, including the principle of "one person, one vote" recognized in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), under-

mine the electoral college that provisions of the Constitution itself specifically mandate for presidential elections. In *Gray* v. *Sanders*, 372 U.S. 368 (1963), for example, the Court explained that the electoral college, "despite its inherent numerical inequality," was "validated" by its specific inclusion in the Constitution. *Id.* at 378; see *id.* at 380 ("The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President."). Similarly, in *Reynolds*, this Court invalidated state apportionment plans inconsistent with the "one person, one vote" principle, but nonetheless stressed that the Senate apportionment scheme (which, like the electoral college, does not follow the "one person, one vote" principle) is "one ingrained in our Constitution, as part of the law of the land." 377 U.S. at 574.

c. The court of appeals decision is consistent with every court that has addressed the issue of the right of constitutional territories (and derivatively their citizens) to participate in presidential elections. In *Attorney General* v. *United States*, 738 F.2d 1017, 1019 (1984), cert. denied, 469 U.S. 1209 (1985), the Ninth Circuit rejected a suit seeking presidential voting rights brought on behalf of U.S. citizens residing in Guam. That court explained that "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states; citizens vote indirectly for the President by voting for state electors." The court concluded: "Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation."). Accord *Sanchez* v. *United States*, 376 F. Supp. 239, 242

(D.P.R. 1974) ("until the Commonwealth [of Puerto Rico] votes for Statehood, or until a constitutional amendment is approved which extends the presidential and vice presidential vote to Puerto Rico, there is no substantial constitutional question raised").

2. The court of appeals also correctly rejected petitioners' contention that various international instruments support their request for judicial intervention to permit citizens residing in Puerto Rico to participate in presidential elections.

a. First, none of the international instruments invoked by the petitioners creates legal rights or obligations enforceable through the courts. Two of the instruments—the Universal Declaration and the Inter-American Democratic Charter—are aspirational resolutions that are not binding by their terms and therefore cannot create legal rights or obligations.

With respect to the Universal Declaration, Eleanor Roosevelt, Chairman of the United Nations Commission on Human Rights when the Declaration was drafted, spoke for the United States and stated that the Declaration "was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of principles." See John P. Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, *in The International Protection of Human Rights* 39, 50 (Evan Luard ed. 1967). Accordingly, the Universal Declaration "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004); see also *Flores* v. *Southern Peru Copper Corp.*, 414 F.3d 233, 261 n.38 (2d Cir. 2003) (Universal Declaration is "merely a non-binding resolution") (citation omitted).

The Inter-American Democratic Charter, adopted in 2001 by the General Assembly of the Organization of American States (OAS), likewise is merely a non-binding aspirational instrument. Immediately prior to the Charter's adoption, the U.S. Ambassador to the OAS made that point clear, stating to the OAS that "the United States understands that this Charter does not establish any new rights or obligations under either domestic or international law." Remarks of Ambassador Roger Noriega, OAS Permanent Council Meeting (Sept. 6, 2001), excerpted in Representation: Inter-American Democratic Charter, *2001 Digest* chap. 6(I)(1), at 347. Moreover, the Charter speaks in "broad generalities" and in that way confirms that its provisions "are declarations of principles, not a code of legal rights." *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). And the Charter itself gives no indication that it is to be enforced by courts, but instead provides for an international diplomatic mechanism to address non-observance of its provisions. See Inter-American Democratic Charter, arts. 17-22.

The ICCPR, while a binding international agreement, is not self-executing and, as the Executive stated when submitting it to the Senate for ratification, its substantive provisions "would not of themselves become effective as domestic law." S. Exec. Docs. Nos. C, D, E, and F, 95th Cong., 2d Sess., at vi (1978); see also *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1987). As "a compact between independent nations," the ICCPR "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it," and any infraction be-

comes "the subject of international negotiations and reclamations." *Head Money Cases*, 112 U.S. 580, 598 (1884). Thus, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Ibid.*

Moreover, the Senate expressly stated in its resolution of ratification that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. 8071 (1992). Thus, controlling authority from this Court, *Sosa*, 542 U.S. at 734-735, establishes that the ICCPR is not self-executing and does not create obligations enforceable in the courts. The Senate expressly conditioned its ratification of the ICCPR on the proviso that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States of America as interpreted by the United States." 138 Cong. Rec. at 8071. An interpretation of the ICCPR to require a change in the constitutional framework for the selection of the President and Vice President would be directly contrary to that understanding.

b. In any event, the international instruments relied on by petitioners would provide no basis for relief in this case, because *no* international instrument can alter the system set forth in the Constitution for selecting the President and Vice President. This Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17 (1957) (plurality opinion); see *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984) (collecting cases). Indeed, it is "obvious" that "no agreement with a foreign nation can confer power on the Congress, or on any other

branch of Government, which is free from the restraints of the Constitution." *Reid*, 354 U.S. at 16.

This principle applies even though the Supremacy Clause provides that treaties shall be the "Law of the Land." As the *Reid* Court held, there is "nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." 354 U.S. at 16. Statutes also are the "Law of the Land," but like treaties, must yield to the Constitution. And because a statute can override or abrogate a treaty, "[i]t would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Id.* at 18.[2]

c. Finally, even apart from questions of constitutional supremacy and judicial enforceability, adherence to the electoral college system is not inconsistent with any of the three international instruments at issue. Each of those instruments speaks generally concerning the right to vote in periodic elections and to take part in the governance of one's country. Those rights are exer-

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[2] This Court's decision in *Roper* v. *Simmons*, 125 S. Ct. 1183 (2005), does nothing to undermine this longstanding principle. In that case, the Court looked to international understanding to *confirm* its holding that imposition of the death penalty for offenders under the age of 18 at the time of the offense is inconsistent with evolving standards of decency and therefore violates the Eighth Amendment. See *id.* at 1198-99; see also *id.* at 1200 (acknowledging that the opinion of the world community is "not controlling our outcome"). Unlike questions of cruel and unusual punishment under the Eighth Amendment, the validity of the constitutional framework establishing the electoral college is not subject to a standard that focuses on "evolving standards of decency." Thus, nothing in *Roper* permits resort to international instruments to override the clear commands of Article II.

cised by the citizens of Puerto Rico within the context of a vibrant democratic political system. Federal law establishes Puerto Rico as a Commonwealth with rights of self-government and guarantees its citizens numerous statutory and constitutional rights. See, *e.g.*, 48 U.S.C. 731d, 734, 737; 8 U.S.C. 1402; *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 7-8 (1982); *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992); *Lopez* v. *Aran*, 844 F.2d 898, 902 (1st Cir. 1988).[3]

On the important question of Puerto Rico's status in relation to the United States, the citizens of Puerto Rico have not been denied their right to participate. Commonwealth status, as opposed to statehood, has advantages as well as disadvantages. See, *e.g.*, 26 U.S.C. 933 (income of Puerto Rico residents is not subject to federal income tax). With full knowledge of both the benefits and drawbacks of statehood, including the implications of that status on participation in presidential elections, the citizens of Puerto Rico have voted repeatedly—in 1967, 1993, and 1998—against statehood. See José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 Rev. Jur. U.P.R. 1, 12-13, 17, 19 (1999).

3. The court of appeals also correctly held that the Declaratory Judgment Act does not provide relief here.

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[3] The United Nations has recognized that "the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination," and "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 26, U.N. Doc. A/2630 (1953).

Because the international instruments at issue provide no individual legal rights, a court cannot enter a declaratory judgment on the question whether United States action is inconsistent with those instruments. Entering such a judgment would be an unwarranted intrusion by the courts into matters of domestic constitutional structure and delicate areas of foreign relations in which they are ill-equipped to operate, and would reflect an incorrect use of the Declaratory Judgment Act to circumvent the lack of both private rights and judicial enforceability.

The Declaratory Judgment Act, 28 U.S.C. 2201, provides that "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Despite this seemingly broad language, the reach of the Act is limited and was not designed to circumvent a lack of jurisdiction, rights, or a substantive right of action. See *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (holding that "a declaratory judgment is not available when the result would be a partial 'end run' around" Eleventh Amendment immunity); *Marshall* v. *Crotty*, 185 F.2d 622, 628 (1st Cir. 1950) (holding that, where a former government employee did not have a right to reinstatement by way of mandamus, the court "is likewise without jurisdiction to give a declaratory judgment determining the reinstatement rights"). Where a party seeking declaratory relief has no underlying substantive right of action, a declaratory judgment not only serves as an inappropriate "end run," but also results in a judgment that is "futile and ineffective." *Id* at 627. As a judgment that under no circumstances

could be backed by a coercive order, it "would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason" as well. *Green*, 474 U.S. at 73 n.2; see *Riva* v. *Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995).

Indeed, a naked declaration concerning the United States' observance of otherwise judicially unenforceable international instruments would not "clarify[] and settle[] the legal relations in issue," nor would it "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Edwin Borchard, *Declaratory Judgments* 299 (2d ed. 1941). Such a declaration would serve only to embroil the Court in an ongoing political debate by offering the panel's opinion in areas of constitutional structure that are committed to the statehood or amendment process and matters of foreign policy within the responsibility of the political Branches. The court of appeals therefore correctly held that declaratory relief is inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-650

In the
Supreme Court of the United States

IGARTUA DE LA ROSA, et al.,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

On appeal from the United States District Court for the District of Puerto Rico

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BRIEF OF MICHAEL RICHARDSON AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

No. 05-650

IGARTUA DE LA ROSA, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR WRIT OF CERTIORARI

Now comes, Michael Richardson, *pro se*, and moves this Honorable Court for leave to file an *amicus curiae* brief in support of Appellants' Petition for Writ of Certiorari and states as follows:

1) That Movant has secured the written consent of Appellants to file a brief.

2) That Movant has not secured the written consent of the Solicitor General for Appellee to file a brief.

3) That Movant requested the consent to file a brief from the Solicitor General by first-class mail and facsimile transmission on December 15, 2005.

4) That Movant has not received any written response from the Solicitor General to Movant's request of December15, 2005.

5) That Movant was told by phone on January 19, 2006, by the Solicitor General's case management office, that consent was withheld because Movant is not an attorney authorized to practice before the Supreme Court; and, that Movant has no interest in the case.

6) That Movant is acting in his own behalf and represents no person other than himself.

7) That judicial notice has been taken of Movant's brief-writing skills by a state appellate court in *Richardson v. Grundel*, 406 N.E.2d 575 at 578:

> From the record in this case, it seems that Mr. Richardson is, indeed a layman. The addition of the appellation "quasi" by the trial court may well have resulted from the court's marvel at the erudition and skill with which Mr. Richardson researched and briefed his claim. This Court is likewise impressed with the quality of this pro se appellant's brief and argument.

8) That Movant has an interest in the case in that Movant desires to reside in Puerto Rico but does not want to lose or surrender the right to vote for President of the United States.

Wherefore, Movant respectfully prays this Honorable Court to grant leave to file an *amicus curiae* brief in support of Appellant's Petition for Writ of Certiorari.

Dated this 23rd day of January 2006.

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INTEREST OF THE AMICUS CURIAE

The *amicus* is a United States citizen residing in Massachusetts enjoying full rights of suffrage.[1] I desire to move to Puerto Rico but am prevented from moving there because I do not wish to lose my right to vote for President of the United States. Neither Massachusetts state law nor the federal Overseas Citizens Absentee Voting Act, 42 U.S.C.1973ff, will protect or extend my right to vote for President of the United States if I move to Puerto Rico. I respectfully submit this brief *amicus curiae* to invite the Court's attention to the unique circumstances of the case that warrant a review of the merits of the case.

INTRODUCTION

The inferior electoral status of United States citizens residing in Puerto Rico, which has barred them from voting in Presidential elections, was first the subject of litigation in *Sanchez v. United States*, 376 F. Supp. 239 (D. Puerto Rico, 1974). The court opined, "Although citizenship may be a prerequisite to voting, the right to vote is not an essential right of citizenship." *Id.* at 241.

The issue of voting in Presidential elections in Puerto Rico was again litigated in *Igartua de la Rosa v. United State*, 842 F. Supp. 607 (D. Puerto Rico, 1994). The court dismissed the complaint, "for failure to state a claim upon which relief can be granted." *Id.* at 612. Plaintiffs appealed but the lower court decision was summarily affirmed. *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) *Cert.* denied, 514 U.S. 1049 (1995).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states no counsel for a party authored any part of this brief, and no one other than *amicus* has made a monetary contribution to its preparation or submission, or authored any portion thereof. Written consent of the Appellants for this *amicus* brief is on file with the Clerk. The Appellees have not provided written consent. A Motion for Leave to File an *Amicus Curiae* Brief in Support of Appellants is appended.

Again, the issue of voting in Presidential elections by citizens residing in Puerto Rico was brought before the courts in *Igartua de la Rosa v. United States*, 107 F.Supp.2d 140 (D. Puerto Rico, 2000) and 113 F.Supp.2d 228 (D. Puerto Rico, 2000). Plaintiffs prevailed with the court finding, "United States Citizens residing in Puerto Rico have the right to vote in Presidential elections and that its electoral votes must be counted in Congress." 113 F.Supp.2d at 242. Defendant sought review and obtained reversal of the lower court order in *Igartua de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000) under a doctrine of *stare decisis*.

Yet again, the issue of voting in Presidential elections by citizens residing in Puerto Rico was once more brought before the courts in *Igartua de la Rosa v. United States*, 331 F.Supp.2d 76 (D. Puerto Rico, 2004) and dismissed, yet again, under the doctrine of *stare decisis*. Plaintiffs sought review but the appellate court affirmed the lower court in *Igartua v. United States*, 386 F.3d 313 (1st Cir. 2004), and then subsequently vacated its decision. An *en banc* court assumed jurisdiction of the appeal from the three-judge panel resulting in the split 5-2 appellate decision, *Igartua de la Rosa v. United States*, 407 F.3d 30, for which review is presently sought by Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The disenfranchisement of United States citizens residing in Puerto Rico from voting in Presidential elections is not only a severe burden to the residents of the island but is also a burden borne by countless United States citizens who desire to live in Puerto Rico but are unwilling to surrender their right to vote for President of the United States.

Although the unique facts of America's control of the island have confined jurisdiction to the United States First Circuit Court of Appeals, hence removing a possible conflict of appellate decisions, the issues presented fundamentally effect the benefits of

United States citizenship at-large and also implicate the Ninth Amendment unenumerated right to vote.

Further, although the lower courts are free to interpret treaty law, this Court is the only body capable of bringing final resolution to a question posed in the instant case of United States citizens' voting rights arising under formally adopted treaty law.

ARGUMENT

I. THE CONFINEMENT OF VOTING RIGHTS CONTROVERSIES IN PUERTO RICO TO THE FIRST CIRCUIT COURT OF APPEALS ELIMINATES ANY CONFLICT BETWEEN APPELLATE CIRCUITS THUS LIMITING REVIEW

The well established role of the Supreme Court in settling disputes that arise from conflicting decisions between the various United States Circuit Courts of Appeal will never reach the disenfranchisement from voting in Presidential elections of United States citizens residing in Puerto Rico.

The unique history of the island, and its control by the United States of America, has served to confine Puerto Rico's appellate jurisprudence on voting rights issues to the United States First Circuit Court of Appeals. There are no analogous situations; Puerto Rico's relationship to the United States is *sui generis*. Although other disenfranchised United States citizens reside in various territorial possessions outside the First Circuit, their unfortunate circumstances are distinguishable from the plight of citizens residing in Puerto Rico because of the island's own military, legislative, and judicial history.

Puerto Rico was ceded to the United States from Spain by the Treaty of Peace between the United States of America and the Kingdom of Spain [Treaty of Paris], 30 Stat. 1754, on December 10, 1898. Article IX of the Treaty reads: "The civil rights and

political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by Congress." *Id.* at Art. IX, Para 2.

The Foraker Act, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. in scattered sections), terminated the then military administration of the island and established a non-voting resident commissioner to Congress in 1900.

The Jones Act, 39 Stat. 951 (1917) (codified at 8 U.S.C. 1402), statutorily granted Puerto Rican residents United States citizenship, provided a bill of rights, and established a locally elected House and Senate in 1917.

This Court ruled in *People v. Balzac*, 258 U.S. 298 (1922), that Puerto Rico was an unincorporated territory to which not all provisions of the Constitution are extended. *Balzac*, the capstone of the earlier *Insular Cases*[2], sealed to the present day a judicially recognized legal and political status unique to Puerto Rico. The *Insular Cases* were a series of decisions by this Court in the first years of American control of the island that defined the peculiar and particular relationship of Puerto Rico to the United States.

Appellate Judge Torruella, in his dissent in the instant case, notes the application of the *Insular Cases* to "discrete minorities":

> [T]he Supreme Court, in 1901, decided the *Insular Cases*, wherein it sanctioned Puerto Rico's colonial status *ad perpetuam*. There is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licensing the downgrading of the rights of discrete minorities within the political hegemony of the United States.[3]

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[2] For *Insular Cases* see, *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901).

[3] See, *Igartua de la Rosa v. United States*, 407 F.3d 30 (1st. Cir. 2005) citing *Plessy v. Ferguson*, 163 U.S. 537 (1896).

The Commonwealth of Puerto Rico, with its own constitution, was born out of the Puerto Rican Federal Relations Act, 64 Stat. 319 (1950) (codified at 48 U.S.C. 731(b)).

The United Nations adopted Resolution 748, on November 21, 1953, recognizing the new status of Puerto Rico and, thus, eliminated the need for the United States to report on Puerto Rico as a non-self-governing territory on November 21, 1953.

No state, territory, or possession of the United States has such a unique legislative and legal history with the resultant status rendering any appellate judicial decision on the right to vote for President of the United States by citizens residing in Puerto Rico to the exclusive venue of the First Circuit Court of Appeals. There can be no conflict between the appellate circuits over voting in the Presidential election in Puerto Rico. Thus, the *en* banc 5-2 split of the First Circuit, now pending review by this Court, is the jurisdictional equivalent of a conflict between the federal appellate circuits.

II. THE NINTH AMENDMENT PROTECTS THE RIGHT TO VOTE FOR UNITED STATES CITIZENS LIVING IN PUERTO RICO, AND THE RIGHT TO RESIDE IN PUERTO RICO WITHOUT LOSS OF SUFFRAGE

A. The Ninth Amendment protects the unenumerated right to vote in Presidential elections

United States citizens residing in Puerto Rico are subject to, and enjoy the protection of, this Court as a fundamental right. The same citizens also enjoy other fundamental rights under the Constitution, even though they lack equality with all of the rights enjoyed by United States citizens residing in a state. A citizen's right to vote for President is a fundamental right protected by the Ninth Amendment, U.S. CONST., Amendment IX.

The Preamble of the United States Constitution opens with the phrase, "We the People," not "We the States". U.S. CONST., Preamble. Before the ratification of the first ten amendments, the Constitution did not speak of, or provide for, individual rights. The People are the source of fundamental rights.

The Article II provision for states to select Presidential Electors is procedural in nature and does not grant nor take fundamental citizen's rights. U.S. CONST., Art. II, Sec. 1, cl. 2. The body of individual rights found in the Constitution is in the first ten Amendments, known as the Bill of Rights. The Ninth Amendment guarantees individuals those fundamental rights inherent to citizenship in a democracy which are not enumerated in the Bill of Rights.

The most prominent reliance on Article II as a source of voting rights in Presidential elections is *Bush v. Gore*, 531 U.S. 98 (2004). However, *Bush v. Gore* did not address the Ninth Amendment unenumerated rights of the People.

This Court has acknowledged that certain rights which are not spelled out in the Constitution must be recognized in order to make the Constitution whole. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court recognized a personal right to privacy which was not articulated in the Constitution. If a right to privacy lies within the scope of fundamental rights protected by the Ninth Amendment than a preeminent right like voting for President of the United States is also afforded protection.

This Court clearly recognized the fundamental nature of the right to vote for President in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In *Anderson*, this Court said a Presidential election is, "a uniquely important national interest." Continuing, "For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Id.* at 794.

Nearly a half-century before *Anderson*, this Court noted the fundamental importance of the Presidential election. "The President is vested with the executive power of the Nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs v. United States*, 290 U.S. 534 (1934) at 545.

Voting for President of the United States is not done directly, but by Electors. The Electors are selected by states based on the popular vote for President by the People. The Article II provision for the selection of Electors in the states preceded Spain's ceding of Puerto Rico to the United States. The failure of Congress, either by legislation or the amendment procedure, to provide for the selection of Electors for the United States citizens residing in Puerto Rico does not negate the inherent Ninth Amendment right of citizens to vote. The Ninth Amendment right to vote for President is independent of Article II and would still be an unenumerated fundamental right even if Article II were stricken from the Constitution.

B. The Ninth Amendment protects the unenumerated right to reside in Puerto Rico without surrendering the right to vote

The Ninth Amendment protection of fundamental unenumerated rights protects not only those United States citizens residing in Puerto Rico from disenfranchisement but also extends to citizens residing in the states. All United States citizens may travel freely to and from the island of Puerto Rico to any of the states and citizens residing in Puerto Rico may freely move their residence to any state without loss of any fundamental right.

However, United States citizens residing in the states may not move their residence to Puerto Rico without loss of suffrage in the Presidential elections. Citizens that live in the states, unwilling to lose their Ninth Amendment fundamental right to vote for the

President, are now barred from moving to Puerto Rico by the misplaced application of Article II of the Constitution.

Just as the Ninth Amendment shields the People from disenfranchisement, it also protects the fundamental right to live under the protection of the United States without penalty of the loss of suffrage.

III. INTERNATIONAL TREATY CLAIMS AND OBLIGATIONS ARE NATIONAL IN SCOPE AND CONTROL OR INFLUENCE FOREIGN AFFAIRS

While lower courts are free to interpret treaty law, only review by this honorable Court is sufficient to provide the necessary finality.

In the instant case, the vacated *per curiam* order of the First Circuit three-judge panel majority closed with the observation: "Indeed, it seems apparent that a definitive constitutional ruling of the magnitude sought here can, in the final analysis, only emanate authoritatively from the Supreme Court itself." *Igartua de la Rosa v. United States*, 386 U.S. F.3d 313 (1st Cir. 2004) at 314.

In a monitory addressed to plaintiff Gregorio Igartua de la Rosa, the District Court in the case at hand offered *dicta* illustrating the frustrations of lower courts over "The Puerto Rican Dilemma":

> Indeed, other judges, district and appellate, in this and other Circuits have demonstrated concern over the anomaly presented because of the "peculiar structure" of the constitutional dictates relating to the election of the President resulting in U. S. citizens residing in Puerto Rico being unable to vote in a presidential election. [footnotes omitted]

Igartua de la Rosa v. United States, 331 F.Supp.2d 76 (D. Puerto

Rico 2004) at 80. The District Court monitory continues:

> "Equally acidulous are the noble pronouncements written into treaty obligations assumed by the United States such as the ICCPR [International Covenant on Civil and Political Rights] which employs the following aspiring language: "Every *citizen* shall have the right ..., to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and *[a]ll persons* are equal before the law." Obviously these noble utterances about the rights of *all* citizens before the law sits ill at ease with the notion that there is an exception to that right if one is a resident of Puerto Rico." [footnotes omitted] *Id.* at 80-81.

An appellate jurist from the Second Circuit has observed *ex curia* the problems the abridgment of the voting rights of U. S. citizens residing in Puerto Rico has presented to our nation's diplomatic corps to the United Nations: "In addition, this exclusion fuels annual attacks on the United States in hearings in the United Nations, at which the United States is decried as hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home." *Romeu v. Cohen*, 265, F.3d 118 at 127.

The appellate *en banc* majority opinion, for which review is sought, expressed its own concern about rendering a judicial decision which "could also embarrass the United States in the conduct of its foreign affairs...." *Igartua de la Rosa v. United States*, 407 F.3d 30 (1st Cir. 2005). The majority opinion then illustrates the limitations of lower court interpretation of treaty law:

> Whatever the State Department might later say, such a declaration by a federal court of a supposed "treaty obligation" could be trumpeted as propaganda in

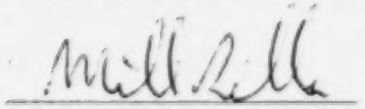
> international bodies and elsewhere. This is a legitimate concern in considering whether "discretion" should be exercised to grant declaratory relief. Of course, no such declaration would confer a presidential vote on Igartua: it would merely reinforce the disturbing view that judges have no proper notion of where their own authority ends." *Id.*

These statements demonstrate a misunderstanding of the role of the judiciary vis-vis treaties and international law. The review of treaty law, as an integral part of the law of the land, is a non-delegable judicial duty. Indeed, the federal courts are the final interpreters of treaties. In this case, with fundamental voting rights at issue, the attention of the Supreme Court is needed.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be granted and the decision below should be reviewed on its merits.

Respectfully submitted,



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Dated this 23rd day of January 2006